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EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book, or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 782

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALFRED YOUNG CHICK AND WILLIAM FLANDERS LEWIN, COPARTNERS UNDER THE FIRM NAME AND STYLE OF A. Y. CHICK & COMPANY,

Appellants,

vs.

THE MERCANTILE TRUST COMPANY AND THE SAN JOAQUIN ELECTRIC COMPANY,

Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the Southern District of California.

FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

Records of Criminal
Court of Appeals.
180.

INDEX.

United States Circuit Court of Appeals, for the Ninth Circuit.

ALFRED YOUNG CHICK and WILLIAM FLANDERS LEWIN, Copartners Under the Firm Name and Style of A. Y. CHICK & COMPANY,
Appellants.

vs.

THE MERCANTILE TRUST COMPANY, as Trustee, and the SAN JOAQUIN ELECTRIC COMPANY,
Appellees.

Order Extending Time to Docket Cause.

Good cause therefor appearing, it is hereby ordered that the time heretofore allowed said appellant to docket said cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same hereby is enlarged and extended until and including the 26th day of December, 1901.

Dated at Los Angeles, California, November 2d, 1901.

OLIN WELLBORN,
United States District Judge for the Southern District of California.

[Endorsed]: No. 782. United States Circuit Court of Appeals for the Ninth Circuit. Alfred Young Chick and Wm. Flanders Lewin, Copartners etc., vs. The Mercantile Trust Co., Trustee, etc. Order Extending Time to Docket Cause. Filed November 6th, 1901. F. D. Monckton, Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

To the Mercantile Trust Company, as Trustee, and The San Joaquin Electric Company, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, on the 26th day of November, A. D. 1901, pursuant to an order allowing an appeal entered in the clerk's office of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, from the order and decree entered by said Court on the 3d day of September, 1901, in that certain cause, being in equity No. 916, wherein Alfred Young Chick and William Flanders Lewin, copartners under the firm name and style of A. Y. Chick & Company, are intervenors and appellants, and you, The Mercantile Trust Company, as Trustee, are complainant and appellee, and you, The San Joaquin Electric Company, are defendant and appellee, to show cause, if any there be, why the order and decree against said appellants in the said order allowing appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable OLIN WELLBORN, United States District Judge for the Southern District of California, and one of the Judges of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, this 28th

day of October, A. D. 1901, and of the Independence of the United States, the one hundred and twenty-sixth.

OLIN WELLBORN,

United States District Judge for the Southern District of California.

Service of the within citation is hereby acknowledged this 30th day of October, 1901.

CHAS. MONROE,

Per W. J. LUNDY,

Solicitors for Complainant.

BICKNELL, GIBSON & TRASK,

Solicitors for Defendant.

[Endorsed]: In the United States Circuit of Appeals for the Ninth Circuit. Alfred Young Chick et al., Appellants, vs. The Mercantile Trust Company, as Trustee, and The San Joaquin Electric Company, Appellees. Citation. Filed October 30, 1901. Wm. M. Van Dyke, Clerk.

In the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant,
ALFRED YOUNG CHICK and WILLIAM FLANDERS LEWIN, Copartners Under the Firm Name and Style of A. Y. CHICK & COMPANY,
Intervenors.
No. 916.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Southern District of California, Sitting in Equity:

Your orator The Mercantile Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen and resident of said State, brings this its bill of complaint against San Joaquin Electric Company, a corporation organized and existing under and by virtue of the laws of the State of California, and thereupon your orator complains and says:

1. That your orator is a corporation organized and existing under and by virtue of the laws of the State of New York, and having its office or place of business in the city of New York, and is a citizen and resident of said city and State. That the San Joaquin Electric Company is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal office or place of business at Fresno, in San Joaquin County, in said State of California, and is a citizen, resident, and inhabitant of said State and of the Southern District thereof.

II. Your orator further shows that on or about the first day of July, 1895, the defendant made, executed, and issued its certain 1,600 bonds, each for the principal sum of $500, and for the principal sum in the aggregate thereof of $800,000, each bearing date the first day of July, 1895, wherein, and in each of said bonds the said defendant, for value received, promised to pay to the bearer, the sum of $500, in gold coin of the United States of America, of the then standard of weight and fineness, on the first day of July, 1915, at the office of your orator in the city of New York, together with interest thereon at the rate of six per cent per annum, payable semi-annually in like gold coin on the first days of January and July in each year on presentation and surrender of the interest coupons attached to said bonds as they severally should become due, said interest also being payable at the office of your orator.

III. That in order to secure the payment of the principal and interest of said bonds, the said defendant, on

or about the first day of July, 1895, made, executed, and delivered to your orator, as trustee, a certain mortgage or deed of trust, dated on that day, wherein and whereby it granted, bargained, sold, assigned, set over, released, aliened, conveyed, and confirmed unto your orator, and its assigns and successors in trust, for the purposes in said mortgage set forth,

"All the works, contracts, lines, machinery, franchises, and property, real and personal, now owned or controlled or to be hereafter acquired by the San Joaquin Electric Company.

"Also the S. W. ¼ of the S. E. ¼ of section 19, township 8 south, range 23 east, Mt. Diablo base and meridian. Also all water rights, headgates, sluices, flume ditches, aqueducts, waste gates, weirs, bulkheads, reservoirs, reservoir embankments, pressure boxes, penstocks, reservoir sites, possessory rights, rights of way, privileges and easements; also all valves, gates, pipes, pipe-lines, receivers, water-wheels, tail-races, power-houses, buildings, power-house sites, mill-sites, with all generators dynamos, exciters, governors, transformers, switch s, switch-boards, wires, poles, insulators, and cross arms now owned or to be hereafter acquired by the said San Joaquin Electric Company. All of the above-named property being in Madera County, California.

"Also all roads, trails, bridges, poles, pile-lines, cross-arms, insulators, wires, all rights of way, easements, privileges, franchises, and possessory claims, all sub-stations, with all switches, switchboards, transformers, regulators, and equipments, all motors, dynamos, gen-

erators, feeders, mains, circuits, buildings, tools, and appliances, wires, wire-lines, lamps, meters, now owned or to be hereafter acquired by the San Joaquin Electric Company. All the above property being in Fresno County, California.

"Also all the shares of stock of the Fresno Water Company of Fresno, California, owned and held by or on behalf of the San Joaquin Electric Company, also all other bonds, stocks or securities owned or hereafter to be acquired by and held by or for the benefit of the San Joaquin Electric Company."

To have and to hold all such property, and all other possession, franchises and claims acquired or to be acquired, and all other premises in said mortgage expressed to be conveyed and assigned unto the use of your orator and its successors in trust, according to the nature, terms and effect in said mortgage expressed, of and concerning the same, for the benefit, protection and security of the persons holding the said bonds or any of them. That said mortgage or deed of trust was duly recorded in the proper offices in the counties in which the property described therein and thereby conveyed, or intended so to be, was situated. That a copy of said mortgage or deed of trust, marked Exhibit "A," is hereto annexed and made a part of this bill of complaint.

IV. Your orator further shows that of the bonds provided to be issued under and secured by said mortgage or deed of trust, or intended so to be, 1110 bonds, numbered from 1 to 1110, inclusive, for the principal sum in the aggregate of $555,000, were duly executed and issued

by said defendant and were certified by your orator as trustee under said mortgage or deed of trust, and your orator is informed and verily believes are now outstanding in the hands of bona fide holders thereof for value.

V. Your orator further shows that in and by said mortgage or deed of trust it was, among other things, provided that in case the said defendant, or its successors should make default in the payment of any interest on any of said bonds, according to the tenor thereof, the payment thereof having been demanded according to the terms thereof, or should make a breach in any of the covenants or agreements in said mortgage contained by it to be done or performed, and such default or breach should continue for a period of six months, that then and thereupon the principal of all of said bonds then outstanding and unpaid, might, at the election of the trustee, or at the request of one-tenth in amount of the bonds then outstanding and secured thereby become immediately due and payable.

VI. That in and by said mortgage or deed of trust it was further provided that if the defendant or its successors should make default in the payment of the principal or any part thereof, or any installment of interest, or any part thereof, and such default should continue for a space of six months after maturity, and demand therefor, it should be the duty of the trustee, upon request and indemnification in said mortgage provided, to proceed in any proper court to foreclose said mortgage, and that it, the said trustee, your orator, should be entitled to the appointment of a receiver and specific per-

formance of all the covenants therein contained, and the said trustee might, in case of default, apply to any court having competent jurisdiction for instructions as to matters not therein expressly provided for.

VII. Your orator further shows that on or about the first day of January, 1899, there fell due a semi-annual installment of interest upon said bonds, represented by the coupons attached thereto, amounting to the sum of $16,650.00, which amount of interest the defendant refused and neglected to pay, although payment thereof was duly demanded, and that a like default occurred on the first day of July, 1899.

VIII. And your orator further shows that on or about the 11th day of July, 1899, said default having continued for a period of more than six months, and your orator having been requested so to do by the holders of more than a majority of the bonds outstanding and secured by said mortgage or deed of trust, or intended so to be, under the power and authority given to it by said mortgage or deed of trust, elected and declared that the principal of all the bonds then outstanding and unpaid should become immediately due and payable, and served notice of such election upon the defendant.

IX. Your orator further shows, upon information and belief, that the defendant San Joaquin Electric Company, the defendant herein, is insolvent and wholly unable to pay its present or presently accruing indebtedness and liabilities, as well as the principal and interest of said bonds now due as aforesaid, and that the prop-

erty covered by the said mortgage or deed of trust, or intended so to be, is a slender and insufficient security for the payment of said indebtedness.

Your orator further shows, upon information and belief, that in addition to the amount represented by said bonds and coupons, said defendant is indebted to sundry and divers persons in large sums, which debts have been incurred in the operation of the business of the said defendant, and which debts the said defendant is wholly unable to pay. That by reason of the insolvency of the said defendant, it is necessary, for the proper protection of the holders of the bonds and coupons secured by the mortgage or deed of trust given to your orator as aforesaid, that a receiver or receivers of the property of the said defendant San Joaquin Electric Company should be appointed with the powers given to such receiver or receivers in like cases under the course and practice of this court.

X. And your orator further alleges that the matter in controversy herein exceeds five thousand dollars, exclusive of interest and costs.

In consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable, your orator therefore prays that the said mortgage may be decreed to be a lien upon all the property mentioned and described therein and upon all property, real, personal or mixed, rights, franchises, lands, titles, railroad branches, extensions, tolls, in-

comes, rents and issues of the said electric company, defendant herein, securities, properties, choses in action, leases and leasehold interests described in said mortgage, and that said defendant may be decreed to pay unto your orator, for the holders of the bonds secured by said mortgage to your orator, whatever may be due for interest on the bonds secured by the aforesaid mortgage, together with all the costs and expenses in this behalf incurred and expended; and, in default, thereof, that the defendant above named and all persons claiming under it may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to the property, rights and franchises covered by said mortgage, and every part and parcel thereof, and that all and singular the said mortgaged property, with the appurtenances, property and effects, rights, immunities and franchises in said mortgage mentioned may be sold under the decree of this Honorable Court, and that the trustee, after deducting from the proceeds of sale the costs and expenses of said sale and all lawful expenses and charges incurred by said trustee in the execution of the trust hereby created and the reasonable compensation then due the trustee, and enough to indemnify the trustee from all liability arising from the execution of the said trust shall apply so much of the proceeds of said sale as may be necessary to the payment of the principal and interest then unpaid on the bonds secured thereby then outstanding, ratably, to the holders thereof, without discrimination or preference, and shall pay over any surplus to the defendant or to whomsoever shall be entitled to receive the same.

And your orator further prays that an account may be taken of the bonds secured by said mortgage and of the amount due on said bonds for principal and interest, or either.

And your orator further prays that, during the pendency of this suit, a receiver may be appointed according to the course and practice of this court, with the usual powers of receivers in like cases, of all the property, equitable interests, things in action, effects, moneys, receipts and earnings, rights, privileges, franchises and immunities of the said defendant, and its tolls, incomes, rents and issues, and of all other property included in and covered by the said mortgage within the jurisdiction of this Honorable Court; and that the said defendant and all other persons having possession thereof may be decreed to make such transfer or conveyance to such receiver, when appointed, and to the purchaser of said property at any sale which may hereafter be decreed to be made herein, as may be necessary and proper to put them or any of them in possession and control of said property.

And your orators further pray that a writ of injunction issuing out of and under the seal of this Honorable Court, or issued by one of your Honors, directing, commanding, enjoining and restraining the defendant herein, and its officers, directors and agents, and all other persons whomsoever, from interfering with, transferring, selling and disposing of any of the property of the said defendant, or from taking possession of, levying upon, or attempting to sell, by judicial process or otherwise, any portion of the property of the said de-

fendant, and that your orator may have such other and further relief in the premises as the nature of the circumstances of this case may require and to this Honorable Court shall seem just.

And may it please your Honors to grant unto your orator a subpoena of the United States of America, issuing out of and under the seal of this Honorable Court, directed to the defendant San Joaquin Electric Company, and therein and thereby commanding it on a day certain to be named therein and under a certain penalty to be and appear before this Honorable Court, then and there to answer (but not under oath, such oath being hereby expressly waived) all and singular the premises, and to stand to and perform and abide by such order, direction and decree as may be made against it in the premises and as shall seem meet and agreeable to equity and good conscience, and that your orator may have such other or further relief, or both, as to your Honors shall seem just and equitable.

And your orator, as in duty bound, will ever pray, etc.

[Seal] THE MERCANTILE TRUST COMPANY,
By H. C. DEMING,
Vice-President.
Attest: E. R. ADEE,
Secretary.
ALEXANDER & GREEN,
STEPHEN M. WHITE, and
CHAS. MONROE,
Complainants' Solicitors.

W. W. GREEN,
Of Counsel.

United States of America,
Southern District of New York. } ss.

Henry C. Deming, being duly sworn, says, that he is vice-president of the complainant, The Mercantile Trust Company, named in the foregoing bill; that he has read the same and knows the contents thereof, and that the allegations therein contained, so far as they relate to his own act are true, and so far as they relate to the acts of others, he believes them to be true.

H. C. DEMING.

Sworn to before me this 8th day of August, 1899.

[Seal] GEO. V. TURNER,
Notary Public, N. Y. Co., No. 45.

Exhibit "A."

INDENTURE

between the

SAN JOAQUIN ELECTRIC COMPANY,

of

FRESNO, CALIFORNIA,

and

THE MERCANTILE TRUST COMPANY,

NEW YORK.

Dated July 1st, 1895.

This indenture, made this first day of July, 1895, by and between the San Joaquin Electric Company, a corporation duly organized and existing under the laws of the State of California, party of the first part hereinafter referred to as the Electric Company and The Mercantile Trust Company, of the city and State of New York, a corporation existing under and by virtue of the laws of the State of New York, party of the second part, trustee, hereinafter referred to as trustee, witnesseth:

That whereas, said Electric Company has full power to borrow money and issue its bonds therefor and secure the same by way of mortgage or deed of trust upon its property:

And whereas, the stockholders of said Electric Company at their meeting held at the office of the company on the seventeenth day of June, 1895, unanimously adopted the following resolutions:

Resolved: First.—That the bonded indebtedness of this corporation be and the same is hereby created in the amount of eight hundred thousand dollars ($800,000).

Second.—That the directors of this corporation be and they are hereby authorized and empowered for and in the name of said corporation and as and for its corporate act, to borrow money and issue bonds therefor to the amount of eight hundred thousand dollars ($800,000), the said bonds to be of such denomination and form as the said board of directors shall determine upon, and to bear interest at the rate of six per cent (6%) per annum

payable semi-annually, said bonds to become due and payable twenty years from the date thereof.

Third.—And the said directors are further authorized, empowered, and directed, in order to secure the payment of the said bonds, to make, execute, and deliver on behalf of said San Joaquin Electric Company, a first mortgage upon all the real and personal property, and all leaseholds, franchises, rights, lands, machinery, pipes, wires, poles, mains and conduits belonging to said corporation and such as it may hereafter acquire; and to sell and dispose of such bonds in whole or in part at such times and at such prices as they may consider most expedient, and that such bonds and mortgages contain such terms and conditions as the board of directors may determine upon.

And whereas, at a meeting of the board of directors of the San Joaquin Electric Company, duly called and held at the office of said company on the 19th day of June, 1895, a quorum being present, said board of directors unanimously adopted the following resolutions:

Resolved: First.—That the resolutions passed and adopted by the stockholders of the San Joaquin Electric Company, at a meeting held on the seventeenth day of June, authorizing the board of directors to borrow money and issue bonds, be and the same is hereby approved, ratified and adopted.

Second.—That the president and secretary of the San Joaquin Electric Company be, and they are hereby authorized, empowered, and directed to cause to be prepared and to duly execute and deliver to the Mercantile Trust

Company, trustee, sixteen hundred (1600) bonds of the denomination of five hundred dollars ($500) each, bearing date the first day of June, 1895, and numbered from 1 to 1600, both numbers inclusive, each of said bonds shall bear interest at the rate of six per cent per annum, payable semi-annually, on the first days of January and July in each year, such interest to be evidenced by forty interest coupons to be attached to each bond.

Third.—That the president and secretary of this corporation be and they are hereby authorized and directed to procure to be engraved and to issue the bonds of this corporation of the number of sixteen hundred (1600) in the sum of five hundred dollars ($500) each of said bonds to be dated on the first day of July, 1895, and to be payable at the expiration of twenty (20) years from the date thereof, and to bear interest at the rate of six per cent per annum, payable on the first day of January and on the first day of July of each year, principal and interest payable in gold coin.

And they are further authorized and directed to cause the name of this corporation to be engraved or lithographed on said bonds, and to sign their names thereon for and on behalf of and as the act and deed of this corporation, and to attest the same by the seal of this corporation, and they are further authorized and directed to cause coupons for the payment of interest as it becomes due, to be attached to the said bonds, and also a trustee's certificate, and that said bonds shall be substantially of the tenor and form namely:

No. —— $500.

UNITED STATES OF AMERICA,

State of California.

SAN JOAQUIN ELECTRIC COMPANY.

First Mortgage six per cent. Gold Bond.

The San Joaquin Electric Company of the city of Fresno, Fresno County, California, a corporation, duly organized under the laws of the State of California, for value received, hereby promises to pay the bearer the sum of five hundred dollars in gold coin of the United States of America, of its present standard of weight and fineness, on the 1st day of July, 1915, at the office of the Mercantile Trust Company, of the city of New York, and State of New York, together with interest on said sum from the date hereof at the rate of six per cent per annum, and payable semi-annually, in like gold coin, until the maturity of this bond, on the first days of January and July in each year, on presentation and surrender of the interest coupons hereto attached as they severally become due at the office of said Mercantile Trust Company in the city of New York. This bond is one of an issue of sixteen hundred bonds of like tenor, and numbered from 1 to 1,600, both inclusive, of an aggregate amount of eight hundred thousand dollars, duly and legally authorized by the stockholders of the San Joaquin Electric Company, issued and to be issued for the purpose of the payment of all the indebtedness of said company, and for the expen-

ditures which will be necessary in the future for extensions and permanent improvements of property of said company. The payment of each and all of the said bonds of said issue, equally and ratably, together with the interest thereon, without reference to the time when they shall be actually issued, is secured by a deed of trust or mortgage bearing date July 1, 1895, duly executed by the San Joaquin Electric Company to the Mercantile Trust Company, of New York, trustee, upon all the works, contracts, machinery, franchises and property, real and personal, then owned and controlled, or thereafter to be acquired by said company, and which said mortgage contains a provision for a sinking fund for the payment and retirement of said bonds.

This bond shall not become valid or obligatory until authenticated by the signature of said trustee to the certificate on the back thereof.

The San Joaquin Electric Company declares and hereby covenants and certifies that all acts, conditions, and things required to be done, performed or complied with as conditions precedent to the issue of this bond, have been regularly and duly done, performed and complied with, and that this bond is in all respects regular and valid.

In witness whereof, the San Joaquin Electric Company has caused this bond to be sealed with its corporate seal, signed by its president, attested by its secretary, and the interest coupons hereto attached to be executed with the

lithographed signature of its secretary this first day of July, 1895.

[Seal] SAN JOAQUIN ELECTRIC COMPANY,

By ————————,

President.

Attest ————————,

Secretary.

Subjoined to each of said bonds shall be interest coupons, duly authenticated with the lithographed signature of the secretary of the San Joaquin Electric Company and payable to bearer, in the following form:

No. —— $15.00

The San Joaquin Electric Company will pay to bearer fifteen dollars in gold coin of the United States on the first day of ————, at the office of the Mercantile Trust Company in the city of New York being for six months' interest on its six per cent Gold Bond No. ——.

————————,

Secretary.

And the blanks thereof so filled in as to make them fall due every six months from the date thereof, and that the facsimilie signature of the secretary may be lithographed thereon, and that each of said bonds shall have a certificate endorsed thereon, signed by the said trustee or its successors, to the following effect:

TRUSTEE'S CERTIFICATE.

This certifies that the within bond is one of the bonds described in the within mentioned mortgage or deed of trust.

THE MERCANTILE TRUST COMPANY,
Trustee.

By ————————,
Vice-President.

Fourth.—That to secure the payment of the principal and interest of said bonds, the president and secretary of the San Joaquin Electric Company shall make and execute and deliver to the Mercantile Trust Company of the city and State of New York, as trustee, the mortgage or deed of trust of the San Joaquin Electric Company to The Mercantile Trust Company, trustee, upon all the property, real and personal, of the company, and all leaseholds, and all the franchises and rights of the said company, together with all its lands, machinery, pipes, wires, poles, mains, conduits whether the same are now owned, or shall be hereafter acquired by it, with all its incomes and profits; and when so prepared, the president and secretary of the company are hereby authorized and directed to execute the same in the name of the company and under the corporate seal thereof. The said trust deed may contain such other stipulations as may be necessary to most amply secure said bonds.

Fifth.—That in addition to the payment of interest on said bonds, a sinking fund to be in charge of the trustee shall be created and established to provide for the pur-

chase or retirement or redemption of said bonds, and that beginning with the first day of July, 1905, and thenceforth during the existence of any portion of said mortgage debt, an amount equal to ten per cent of the gross receipts of the said San Joaquin Electric Company shall be paid over in semi-annual payments to the trustee on the first days of January and July, in each and every year, to be applied to the purchase, retirement and redemption of the principal and interest on said bonds, but in no case at a rate exceeding par and accrued interest.

And whereas, said bonds have been duly executed and delivered to the trustee, as in said resolutions authorized and directed:

Now, therefore, the said San Joaquin Electric Company, party of the first part hereto, in order to secure the payment of the principal and interest of said bonds, and in consideration of the premises, and in further consideration of the sum of one dollar in hand paid by the said trustee, party of the second part aforesaid, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, set over aliened, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, assign, set over, release, convey, and confirm unto the said The Mercantile Trust Company, party of the second part hereto, and its assigns and successors in trust, for the purposes hereinafter set forth:

All the works, contracts, lines, machinery, franchises, and property, real and personal, now owned or controlled or to be hereafter acquired by the San Joaquin Electric Company.

Also the S. W. ¼ of S. E. ¼ of section 19, township 8 south, range 23 east, Mt. Diablo base and meridian. Also all water rights, headgates, sluices, flume, ditches, aqueducts, waste gates, weirs, bulkheads, reservoirs, reservoir embankments, pressure-boxes, penstocks, reservoir sites, possessory rights, rights of way, privileges and easements; also all valves, gates, pipes, pipe-lines, receivers, water-wheels, tail-races, power-houses, buildings, power-house sites, mill-sites, with all generators, dynamos, exciters, governors, transformers, switches, switchboards, wires, poles, insulators, and cross-arms now owned or to be hereafter acquired by the said San Joaquin Electric Company. All of the above-named property being in Madera County, California.

Also all roads, trails, bridges, poles, pile-lines, cross-arms, insulators, wires, all rights of way, easements, privileges, franchises and possessory claims, all sub-stations, with all switches, switchboards, transformers, regulators, and equipments, all motors, dynamos, generators, feeders, mains, circuits, buildings, tools and appliances, wires, wire lines, lamps, meters, now owned or to be hereafter acquired by the San Joaquin Electric Company. All the above-named property being in Fresno County, California.

Also all the shares of stock of the Fresno Water Company of Fresno, California, owned and held by or on behalf of the San Joaquin Electric Company, also all other bonds, stocks or securities owned or hereafter to be acquired by and held by or for the benefit of the San Joaquin Electric Company.

All capital stock of any corporation or corporations so held as aforesaid, held by or standing in the name of said

party of the first part, upon the books of the corporation or corporations issuing the same, shall from time to time —until and unless the bonds of the San Joaquin Electric Company hereby secured shall be in default—be voted at all meetings of the corporation issuing the said stock in accordance with the directions of the board of directors of the San Joaquin Electric Company.

In case default shall be made on the bonds hereby secured, the trustee is empowered to have the stock reissued in its own name, and thereafter to vote the stock as it may be advised.

The certificates of stock herein required to be placed with the said trustee for the better security of the lien of this indenture shall be registered in the name of the San Joaquin Electric Company or its president, and shall be first assigned in blank by said party of the first part or its president, and delivered to said trustee, and said trustee shall thereupon stamp each and every certificate as follows: "Held by The Mercantile Trust Company under the trusts declared in the mortgage or deed of trust made with the San Joaquin Electric Company to said Mercantile Trust Company bearing date the first day of July, 1895."

A certificate signed by the president and secretary of the said San Joaquin Electric Company shall be conclusive evidence to the trustee of the amount and character of the stocks and bonds and securities belonging to or hereafter acquired by the said San Joaquin Electric Company.

To have and to hold, all and singular, the above property, and all other possession, franchises, and claims acquired and to be acquired, and all other premises hereinbefore expressed, to be conveyed and assigned unto the use of the Mercantile Trust Company and its successors in trust, according to the nature, terms and effect hereinafter expressed, of and concerning the same, for the benefit, protection and security of the persons who hold said bonds or any of them, and for further carrying into effect the conveyance and assignment hereinafter expressed to be made, said Electric Company does hereby appoint the said trustee and its successor in trust, the attorney or attorneys of said electric company to ask and receive payment and delivery of all and every sums of money, goods, chattels, and effects hereinbefore expressed to be assigned and transferred, and to give effectual release and discharge therefor, and for all and any of the purposes aforesaid, or of this instrument, to appoint an attorney or attorneys, or an agent or agents, and from time to time to revoke such appointment, and to use the name of the Electric Company and generally to act in relation to the premises as it or they shall see fit.

And it is hereby agreed and declared that the said trustee and its successors, for the time being, in said trust respectively, shall stand possessed of an interest in all and singular the premises hereinbefore expressed to be conveyed and assigned upon and for the trusts, intents and purposes, and subject to the powers and conditions following, that is to say:

Article I. Until the said Electric Company, or its successors, shall make default in the payment of some principal money or interest of the said bonds, or some of them, according to the tenor thereof, or shall make default in or breach in the performance or observance of any other condition, obligation or requirements by the said bonds, or by this present deed imposed on the said Electric Company, or its successors, in reference to said bonds, and until such default shall have continued for a period of six months, the trustee and every other trustee from time to time of these presents who are hereinafter referred to as the trustee, shall (except as hereinafter provided) permit and suffer the Electric Company and its successors, to possess, manage, operate and enjoy the said works and property of the said San Joaquin Electric Company with its equipments and appurtenances and the premises, properties, and franchises hereinbefore described as conveyed hereby, and to receive, take, and use the incomes, rents, issues and profits thereof in the same manner and with the same effect as if this deed had not been made.

Article II. Said Electric Company covenants and agrees that so holding, possessing and enjoying the property and franchises hereby mortgaged, or intended so to be, it will pay all taxes and assessments thereon during the continuance of this instrument except taxes on the interest of the said trusts therein by reason of this mortgage; that it will not suffer any lien superior to the lien hereby created to attach to said property or franchise, or to any part thereof; that it will keep and maintain the property hereby mortgaged in good order and condition;

that it will keep said electric plant in active operation, and will duly keep and observe all the laws and ordinances lawfully enacted in any way relating to or affecting the franchises, easements, immunities and privileges aforesaid; that it will at all times hereafter provide for and pay the principal and interest of and upon the bonds hereby, or intended hereby to be secured as the same shall become due and payable, according to the form and tenor thereof, and that it will keep all property hereby mortgaged, liable to be destroyed by fire, reasonably insured, and in case of destruction by fire, all insurance money shall be promptly applied to replace such property as may have been injured or destroyed, or to purchase other property needed for the maintenance or operation of said electric plant, and such replaced property shall immediately become subject to this mortgage.

And said Electric Company further covenants and agrees that it will, upon the request of the trustee, do and perform all acts necessary or proper to keep valid the lien hereby created, or intended to be created, and that it will, upon the request of the trustee, at any time hereafter and as often as it may be necessary, make, execute and deliver to the trustee any other or further deed or deeds, acts, conveyances or assurances which may be reasonably desired, advised or required for the purpose of carrying into full effect the object and purposes of this indenture.

Article III. Bonds to the amount of $415,000, being numbered from 1 to 830, inclusive, shall be certified to by the trustee and issued immediately on the execution of this instrument and delivered to the president of the San Joaquin Electric Company or his order.

Bonds to the amount of $35,000, being numbered from 831 to 900, both inclusive, shall be issued, certified and delivered to the president of the San Joaquin Electric Company or his order, upon the order of the board of directors, attested by the president and secretary of said company, whenever they may be required for the general purposes of said company.

The remaining $350,000, in amount of said bonds numbered from 901 to 1600, both inclusive, shall remain in the hands of the trustee in trust to be issued in payment of the cost of betterments or extensions or additional property or investments acquired by the San Joaquin Electric Company as hereinafter provided. Said trustee shall certify to the bonds so held by it in trust and issue the same only upon the affidavit of the president and secretary of the San Joaquin Electric Company showing that the extensions or betterments have been ordered by the directors or the property or investments acquired, and the sum or amount of bonds required to meet the cost of such extensions or betterments, or property or investments acquired, and showing that such extensions and betterments have been made or such property or investments acquired, and that the net annual revenue of the said San Joaquin Electric Company amounts to at least enough to pay six per cent per annum upon all the bonds then outstanding, together with the bonds proposed to be issued, which affidavit shall be satisfactory to said trustee of the facts therein stated.

Article IV. For the purpose of providing a sinking fund for the redemption of a portion of said bonds at or

prior to maturity the San Joaquin Electric Company agrees, that, beginning with the receipts of the said company on the first day of July, 1905, and continuing annually thereafter, it will pay to the trustee ten per centum per annum of the gross receipts of the said company, on the first day of January and July in each and every year until the maturity of said bonds. The trustee shall annually employ the sinking fund in its hands in purchasing bonds secured hereby at not exceeding par and accrued interest, and all bonds so purchased shall forthwith be canceled by said trustee and the numbers certified to the company. Such portion of said sinking fund as shall come into the hands of the trustee and not be used by it in the purchase of bonds as hereinbefore provided, shall be invested by it in interest-bearing securities, and the sum so invested and the interest which may accrue thereon, shall be held by the trustee as a part of said sinking fund, but no such investment shall be made except on the approval first obtained of said Electric Company.

Article V. And whenever the Electric Company or its successors shall make default in the payment of the said bonds or of the interest which shall accrue thereon, and such default shall continue as aforesaid for the period of six months, or if, and whenever, the Electric Company or its successors shall make default or breach in the performance or observances of any other condition, obligation or requirement herein contained, and such default shall continue for the period of six months, then, and in either of such cases it shall be lawful for the trustee with or without the aid of court, or resort to judicial action,

to enter into and upon and to take possession of all and singular the property of every description, and all premises, rights, easements, privileges, and franchises hereinbefore expressed, to be conveyed and assigned, or any of them, or any part thereof, respectively, and to have, hold, and use the same, and to work and operate by its superintendents, managers, receivers, or servants, or other attorneys or agents, said system, and to conduct the business thereof, and to make from time to time such repairs and replacements, and such useful alterations, additions, and improvements, and after deducting and defraying all the expenses thereof, and all payments which may be made for charges or liens of any kind prior to the lien of these presents, and all other expenses and outgoings whatsoever in relation thereto, as well as just compensation for its own services, and for the services of such attorneys and counsel, and all other agents and persons as may have been employed by it, the said trustee shall apply the balance of the moneys arising from such collections and receipts to the payment of any matured and unpaid coupons ratably and without discrimination. If, after the satisfaction of said coupons as herein provided, a surplus shall remain, the trustee shall, during its possession of said property, retain said surplus for the payment of any unmatured coupons as the same may become due, or otherwise dispose of said surplus as any court of competent jurisdiction to which the trustee may apply shall order.

Article VI. In case said Electric Company or its successors shall make default in payment of any interest or any of the said bonds according to the tenor thereof, the

payment thereof having been demanded according to the terms thereof, or in case said Electric Company, or its successors, shall make a breach in any of the covenants or agreements herein contained by it to be done or performed, and any such default or breach shall continue for a period of six months after such default or breach, then and thereupon the principal of all said bonds then outstanding and unpaid, may, at the election of the trustee, or at the request of the holders of one-tenth in amount of the bonds then outstanding and secured hereby, become immediately due and payable.

Article VII. It is hereby agreed and declared that it shall be the duty of the trustee to exercise the power of entry hereby granted, or the power to declare the bonds due and payable hereby granted, or both, or to proceed by suit or suits in equity or at law to enforce the rights of the bondholders in the several cases of default or breach on the part of the Electric Company, or its successors herein specified, in the manner and subject to the qualifications herein expressed, upon the requisition as herein prescribed, namely:

First.—If the Electric Company or its successors shall make default in the payment of some principal money or interest of said bonds, or some of them, according to the tenor thereof, or of the coupons annexed thereto, and such default shall continue for the period of six months above mentioned, in such case the trustee, acting upon its own volition, may, and upon a requisition in writing signed by the holder or holders of said bonds, to an aggregate amount of not less than one-tenth of the amount thereof,

and a proper indemnification of the trustee by such holder or holders against the costs or expenses to be by it incurred, it shall enforce the rights of the bondholders under these presents by entry, or suit or suits in equity, or at law, or under the power of sale herein granted, as it, being advised by counsel learned in law, shall deem most expedient for the holders of said bonds.

Second.—If the Electric Company or its successors shall make a default or breach in the performance or observance of any other condition, obligation or requirement by the said bonds, or by the present deed imposed on the Electric Company, or its successors, and such default or breach shall continue for the period of six months above mentioned, then, and in such case, the trustee may, and upon a requisition in manner aforesaid of not less than one-tenth in interest as aforesaid of the bondholders for the time being; and upon a proper indemnification of the trustee by such applying bondholders against the costs and expenses to be by it incurred, shall enforce the rights of the bondholders under these presents in the manner by the first clause of this article provided.

And it is hereby provided that no action taken by the trustee, or by the bondholders under this clause, shall prejudice or in any manner affect the power or rights of the trustee or of the bondholders in the event of any subsequent default or breach.

Article VIII. That if default shall be made in the payment of the principal or any part thereof, or of any installment of interest, or of any part thereof, and such default continue for the space of six months after maturity

and demand therefor, and the said trustee and a majority in interest of the outstanding bonds shall have declared the whole amount of the principal and accrued interest on said bonds due and payable as hereinbefore provided, and the same shall not be paid, then and thereupon, the said trustee shall have the power and authority to enter upon and take possession of all and singular the property and franchises hereby mortgaged or intended so to be, and the said party of the first part, its agents, successors and assigns are hereby authorized and required to deliver up the same, and the said trustee by itself, its agent or attorney, shall cause said mortgaged premises, property, and franchises to be sold at public auction in bulk or in parcels as it may deem advisable, in the counties of Fresno and Madera, in the State of California, after giving at least ninety days' notice of the time and place and terms of sale, and of the property to be sold, by publishing the same in one daily newspaper in the city of Chicago, in the State of Illinois, one daily newspaper in the city and State of NewYork, and one in the County of Fresno, and one in the county of Madera, California, once in each week in each newspaper for twelve successive weeks preceding the date for which said sale is advertised, and to adjourn said sale from time to time, if necessary, in the opinion of the trustee, if it shall be adjourned, to sell without further notice of the time and place of sale and to execute to the purchaser or purchasers at said sale a conveyance or assignment of the premises and property so sold, which shall be a bar against the party of the first part and all persons claiming by, through, or under it, of

all right, title, interest, claim or demand in and to the mortgaged premises and property, and any part thereof so sold, and out of the proceeds of such sale and the income that may have been received for the use of such property while in the possession of such trustee, after deducting just allowances and expenses of said sale, including attorney and counsel fees and all other expenses, advances, and liabilities which may have been made or incurred by the said trustee in taking care of said property, or in managing its business while in possession thereof, and all payments which may have been made by it for taxes and assessments and other proper charges upon the said property, premises and rights, interests, and franchises, or any part thereof, as well as reasonable compensation for its own services, then to pay the overdue coupons on said bonds, and then the principal and interest of said bonds ratably to the persons entitled thereto, as far as said proceeds will go for that purpose; and in case any surplus should remain to pay the same over to the party of the first part, its successors and assigns, at the office of said trustee.

But in case it shall not be deemed proper and expedient by said trustee to take possession of and sell the said mortgaged premises and property in pursuance of the power of sale herein granted, then it shall be the duty of said trustee, upon request and indemnification as hereinbefore provided, to proceed in any proper court to foreclose this mortgage, and it shall be entitled to the appointment of a receiver, and to the specific performance of all the covenants herein contained, and said trustee, may,

in case of default, apply to any court of competent jurisdiction for instruction as to the matters not herein expressly provided for.

And it is further expressly agreed that any bondholder or bondholders, or any one acting in their behalf, may become the purchaser of the property hereby conveyed at any foreclosure sale made hereunder, whether made by the trustee or by order of Court; and

It is further understood and agreed, that in no case whatever shall the party of the first part, its successors, or assigns, claim any right or advantage by reason of any valuation, appraisement, stay or extension laws that now exist or may hereafter be enacted in the State in which said property is situated or may be found, and said first party hereby releases to the second party its successors in trust all and every such right, claim, and demand; and

Hereby further agrees, that it will neither apply for an injunction nor any stay of the proceedings to arrest or prevent such sale from being made or possession being taken as hereinbefore provided.

It is hereby declared, that the receipts or receipt of the trustee shall be a sufficient discharge to the purchaser or purchasers at any sale or sales made by the said trustee under or in pursuance of any or either of the provisions for that purpose herein contained, for his or their purchase money, and that said purchaser or purchasers, his or their heirs, executors or administrators, after payment thereof, and having such receipt, shall not be liable to see to its proper application or in any manner be answerable for any loss, misapplication or non-application of such

purchase moneys, or any part thereof, or be obliged to inquire into the necessity, expediency or authority of, or for any such sale.

In case of a foreclosure of this trust deed or mortgage and sale of the mortgaged premises and property hereby conveyed or assigned, the proceeds of any such sale shall be applied, first, in the payment of the expenses connected with said trustee, and all expenses and charges incurred by it as trustee; and secondly, in payment of the unpaid interest and principal of the said several bonds issued hereunder as herein provided; and if, after paying in full said bonds and interest there shall be any money remaining, the same shall be paid to the Electric Company, its successors or assigns.

Article IX. Said first party hereby reserves to itself the power and right to, and may at any time hereafter with the approval in writing of said trustee, its successor or successors, sell or exchange any of the chattels real conveyed or hereafter conveyed as aforesaid, or intended so to be, not necessary for the use or operation of said first party, and full power is conferred upon said trustee, its successor or successors, to release and discharge any such chattels real, so sold or exchanged, from the operation of these presents, but any lands or property acquired in substitution for any of said chattels real, so sold or exchanged, shall immediately become subject to the operation of these presents to the same effect as if originally embraced herein by specified description. It is, however, understood and agreed, that before any release or discharge is given of any chattels real secured by this mort-

gage, there shall be deposited with said trustee or its duly authorized agent, the entire proceeds of the sale of such chattels real, which said proceeds of sale shall be surrendered to said first party only upon the delivery of a certificate duly signed under seal of the secretary of said first party, and attested as correct by the treasurer of said first party, that an amount of chattels real, at least equal in value to the chattels real so to be released, has been purchased and fully paid for, and at the date of the surrender of said proceeds is under the operation of these presents, and the certificate of the grantor, under its corporate seal, attested by the signature of its president and secretary, shall be sufficient evidence respecting the facts herein mentioned to justify the trustee in acting.

But the Electric Company may, without action or consent by the trustee, in its discretion, sell and dispose of any items of personal property which have become unnecessary or unfitted for the uses of the Electric Company, and the purchaser thereof shall take the same freed from the lien of this instrument. The Electric Company covenants and agrees, however, that the avails and proceeds of such sales shall be forthwith invested in personal property of like general character, and that no sales shall be made of any personal property, the absence of which will in any manner impair the capacity or efficiency of the plant.

It is also further understood and agreed, that before any property under the operation of these presents which it is desired to substitute for other property acquired by said first party, shall be released from the lien of the

mortgage, the said first party shall deliver to the said trustee a certificate under seal of the secretary and attested by at least three resident property holders in the vicinity that said land or property so to be substituted are at least equal in value to the land or property for which release or discharge from these presents is desired, and shall furnish an abstract of title showing that said land is free from all incumbrances except the lien of this mortgage. But the trustee shall not be responsible for the correctness of said certificate and abstract, or either of them, and shall not be held responsible for any question relating to the title of said property.

The said trustee shall be under no obligation to recognize any person or persons, firm or corporation as a holder or holders of any of the bonds secured hereby, or to do or refrain from doing any act pursuant to the request or demand of any person or persons, firm or corporation, professing or claiming to be such holder or holders of any of said bonds, until such person or persons, firm or corporation shall have produced the said bond or bonds of which he or they claim to be the owner and holder, and deposits the same with the said trustee, and shall also have indemnified and saved harmless the said trustee to its full satisfaction from any and all costs, expenses, outlays, counsel fees and other proper disbursements, and any other liability growing out of the compliance by the trustee with such request or demand, as well as reasonable and proper compensation to it in that behalf.

Should any suit or other proceedings be brought in any court against the said trustee, as trustee under this in-

denture, or by reason of any matter or thing growing out of, or connected with, the trust hereby created or the premises affected thereby, the trustee shall thereupon notify the party of the first part of the fact by delivering such notice at, or mailing the same to, the office of said party of the first part forthwith after its having received the same, and said trustee shall thereupon be under no obligation to enter an appearance by counsel or otherwise, or to defend said suit or other proceedings until indemnified to its satisfaction for so doing. But the said party of the second part may appear to and defend the same without such indemnity if it shall elect to do so, and be compensated therefor from the trust fund. It shall be no part of the duty of the trustee to see to the recording of this indenture as a mortgage or conveyance of real estate, or to the filing thereof as a chattel mortgage, or to do any other act which may be suitable or proper to be done for the continuing of the lien of this indenture, or for giving notice of the existence of such lien. Nor shall it be any part of the duty of the trustee to effect insurance against fire or other damage on any part of the mortgaged premises or property, or to renew any policies of insurance upon the same. The trustee shall be responsible only for reasonable diligence in the management of the trust hereby created, and shall not be answerable in any case for the act or default of any of its agents, attorneys or employees selected with reasonable care or discretion. The trustee shall be entitled to be reimbursed for all proper outlays of every sort and nature by it incurred or made in the proper discharge of this trust, and to receive

a reasonable compensation for any duty it may at any time perform in the discharge of the same, and all such fees, commissions, compensations and disbursements shall constitute a lien on the mortgaged property prior in right of payment to the bonds secured hereby.

All recitals herein contained are made on behalf of the party of the first part, and the party of the second part assumes no responsibility for the correctness of any statements herein contained.

It is mutually agreed by and between the parties hereto that the expressions, "the trustee," "the said trustee," and "said trustee," as used in these presents, shall be construed to mean the trustee for the time being.

Article X. Any trustee hereunder may resign or discharge itself or himself from the trust herein created by notice in writing to the said Electric Company, given three months before such resignation is to take effect, or such shorter time as the said Electric Company may accept as sufficient notice; and in case of a vacancy in the office of trustee by resignation or otherwise, a successor or successors may be appointed by the holders of the majority in amount of the bonds then outstanding, by an instrument in writing duly signed and acknowledged by them, which instrument shall be recorded in the office of the recorder of Fresno and Madera counties, in said State of California, or whatsoever office at said time, by the laws of said State, shall have the lawful custody of the records of said county of Fresno and county of Madera; or in case said majority do not agree upon the appointing of a new trustee or trustees within thirty days after a va-

cancy shall occur, then the said company or the holder or holders of any of said bonds may apply to any court of original jurisdiction in said State of California for the appointment of a new trustee or trustees, upon such notice as such court shall prescribe to be given, in such manner and upon or to such party or parties, person or persons as such Court shall direct, or upon such notice as shall be in accordance with the rules and practice of the Court, shall on its, his or their appointment thereby and thereupon become and be vested with all the powers, rights, estates, and interests granted to or conferred upon said party of the second part of these presents, without any further assurance or conveyance whatsoever.

Article XI. It is agreed by and between the Electric Company and the trustee herein, its successor or successors, that whenever the said Electric Company shall have paid and canceled all the bonds, interest coupons and all other evidences of indebtedness issued hereunder, and shall have kept and performed all other contracts, acts and agreements by it contracted herein to be performed on its part, then, and at such time on reasonable demand, said trustee shall reconvey unto the Electric Company its successors or assigns, or to whom it may direct, all and singular the property, right, title, hereditaments and appurtenances herein conveyed and incumbered, provided that all expenses of such conveyance shall be at the cost and charge of the Electric Company.

In testimony whereof, the parties to these presents have caused the same to be assigned by their respective presidents and their respective corporate seals to be affixed

hereto, attested by their respective scretaries the day and year first above written.

SAN JOAQUIN ELECTRIC COMPANY,
By JOHN J. SEYMOUR,
President.
Attest: J. M. COLLIER,
Secretary.

THE MERCANTILE TRUST COMPANY,
By HENRY C. DEMING,
Vice-President.
Attest: ERNEST R. ADEE,
Secretary.

State of California, }
County of Fresno. } ss.

On this first day of July, in the year of our Lord one thousand eight hundred and ninety-five, before me, L. L. Cory, a notary public in and for said county of Fresno, State of California, residing therein duly commissioned and sworn, personally appeared John J. Seymour, who is personally known to me to be the President of the San Joaquin Electric Company, and J. M. Collier, who is personally known to me to be the secretary of the San Joaquin Electric Company the corporation described in and that executed the within instrument and they each severally acknowledged to me that such corporation executed the same and also acknowledged as such president and secretary that they signed and delivered the said instrument of writing as president and secretary of said company and caused the corporate seal of said company to be affixed thereto pursuant to authority given by the board of directors of said company, as their free and

voluntary act and as the free and voluntary act of said company for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

L. L. CORY,

Notary Public in and for the County of Fresno, State of California.

State of New York,
City and County of New York. } ss.

Before me, William H. Clarkson, a commissioner of deeds of the State of California, and a notary public, on this day personally appeared The Mercantile Trust Company, by its vice-president, known to me to be the person whose name is subscribed to the foregoing instrument as vice-president, and who acknowledged the same to be the act of the said corporation for the purposes and considerations therein expressed.

Given under my hand and seal of office this day of , 1895.

WILLIAM H. CLARKSON,

Commissioner for the State of California, in New York, and Notary Public.

[Endorsed]: 916. U. S. Circuit Court, Southern District of California. The Mercantile Trust Company, as Trustee, against San Joaquin Electric Company. Original. Bill of Complaint. Filed August 21, 1899. Wm. M. Van Dyke, Clerk. Alexander & Green, Solicitors for Complainant.

In the Circuit Court of the United States, Ninth Circuit, .. Southern District of California.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant.

Petition of Alfred Young Chick and Wm. Flanders Lewin for Leave to Intervene.

To the Judges of the United States Circuit Court, Ninth Circuit, Southern District of California.

The pettion of Alfred Young Chick and William Flanders Lewin, doing business under the firm name and style of A. Y. Chick and Company, respectfully shows:

That on the 21st day of August, 1899, the complainant, The Mercantile Trust Company, as trustee, filed its bill of complaint in said court against the defendant San Joaquin Electric Company to foreclose a mortgage, or deed of trust, given and executed by said defendant to said complainant as trustee to secure the payment of certain bonds of the said defendant.

That the defendant in said cause being served with process of subpoena appeared to said bill but has not yet filed its answer thereto.

That it is alleged and set forth in said bill of complaint that there were issued and are oustanding of the bonds of

said defendant secured by the mortgage or deed of trust set forth and made part of the said bill of complaint, eleven hundred and ten bonds numbered from 1 to 1110, inclusive, for the principal sum in the aggregate of $555,000.00.

That your petitioners, Alfred Young Chick and William Flanders Lewin, partners as aforesaid, are residents and citizens of the Kingdom of Great Britain, the complainant, The Mercantile Trust Company, is a corporation organized and existing under the laws of the state of New York, and is a resident of said State, and the defendant San Joaquin Electric Company is a corporation organized and existing under the laws of the State of California and is a resident of said State and of the said District.

That one John J. Seymour was by your Honorable Court appointed receiver of the property and business of the said defendant, upon the application of the said complainant in said cause, and is now acting as such receiver and as such has possession of the property of said defendant, described and set forth in the bill of complaint of said complainant in said suit, and has the full control and management of the business of said defendant; and one John S. Eastwood is now and was at the times hereinafter mentioned, an officer and the engineer of the said defendant, and is now acting as such engineer under the said receiver.

That your petitioners are now and have been for a long time, and were before the commencement of this suit, the owners of seventy-eight of the said bonds of the said defendant San Joaquin Electric Company, being a

part of the same series of bonds described in paragraph II of said complainant's bill of complaint and secured by the mortgage or deed of trust described in said bill.

That on or about the 1st day of January, 1899, there fell due a semi-annual installment of interest on said bonds so held and owned by said petitioners, which said interest is represented by the coupons attached thereto amounting to the sum of $1,170.00, which amount of interest the said San Joaquin Electric Company neglected to pay although payment was duly demanded and although possessed of abundant means and resources so to do, and that a like default occurred on the 1st day of July, 1899, and said installment of interest would have been paid, as your petitioners are informed and believe, had not the scheme hereinafter set out been entered into.

That in the month of January, 1899, the said defendant San Joaquin Electric Company had and possessed ample means, income and resources to meet all of its just debts and liabilities due and to become due, including accrued and accruing interest on all of its said bonds, but instead of applying its said means to the payment of its obligations, including said interest, its officers and directors, including the said John J. Seymour and John S. Eastwood, conspired together for the purpose of diverting, and did unlawfully and fraudulently divert its funds to other purposes and purposely and intentionally avoided paying the interest on said bonds for the fraudulent and unlawful purpose of enabling certain of the bondholders of said company, as hereinafter alleged, to

bring and maintain a suit to foreclose the mortgage or trust deed securing the bonds of said company and to carry out a scheme entered into by said bondholders, and the said officers of said company to reorganize said company to the detriment and injury of said company and other of the bondholders thereof; and that the said officers of said company and the said bondholders unlawfully and fraudulently conspired together to induce the said complainant, The Mecantile Trust Company, as trustee, and its officers, to foreclose the said mortgage or trust deed by suit against said defendant company with the object and purpose of carrying out said scheme for the reorganization of said company in the interest of said bondholders and said officers of the defendant company. And in pursuance of said unlawful and fraudulent scheme the officers of said company having laid the foundation for the right of said trustee to foreclose said mortgage or deed of trust, the said bondholders for the purpose of bringing about said foreclosure and re-organization and being sufficient in numbers to authorize them so to do under the terms of said mortgage or trust deed, requested or caused the said trustee to be requested, by their agent or agents, to bring suit to foreclose the said mortgage and sell the property of the defendant company described therein, not for the purpose of enforcing the collection of the amount due from said defendant to its bondholders, but for the sole purpose of bringing about such reorganization of said company in the interest of the bondholders requesting such foreclosure, and with a view and for the purpose

of destroying the value of the bonds held by these petitioners and others similarly situated, it being fraudulently agreed between the said bondholders and the said John J. Seymour, president of said defendant company, and John S. Eastwood, the engineer thereof, that if the said officers of said company would facilitate the foreclosure of said mortgage they, the said officers, should have and receive one hundred thousand dollars of the stock of a corporation to be organized as a part of said scheme of reorganization, and the said officers in consideration of the said promises of stock of said new corporation to be organized, did facilitate the foreclosure of said mortgage by fraudulently and purposely and unnecessarily allowing the interest upon said bonds to become and continue delinquent for the term of six months whereby the right of the bondholders to request the foreclosure of said mortgage, and the right of the said trustee to foreclose the same, became and was perfect according to the terms of the said mortgage or deed of trust. And that it was further agreed and understood as a part of the said scheme of foreclosure and reorganization that the said John J. Seymour, president of said defendant company, should be, and he was in pursuance of said agreement, appointed the receiver in the suit to foreclose said mortgage as before alleged, upon the request of the said bondholders; and the said president and engineer of said defendant corporation are now and have been acting in collusion with said bondholders to bring about the foreclosure and sale of the property of said defendant corporation for the benefit of said

bondholders who have inaugurated and are carrying out said scheme of reorganization and for the purpose and with the object of destroying the value of the securities held by these petitioners and other bondholders similarly situated.

That the foreclosure proceedings in this action were conceived, commenced and are being prosecuted in the furtherance of said scheme for the reorganization of said defendant corporation; that said scheme was contrived by and between the said bondholders at whose suggestion, instigation and request, as alleged in the bill of complaint, this action was begun, and the officers and directors of said defendant corporation; that it was provided and agreed by and between the parties to this action and the said bondholders at whose instigation the said foreclosure proceedings were begun as aforesaid, that the said defendant company should default in the payment of interest on its bonds, that the said trustee, the complainant in said suit, should thereupon elect to declare the entire principal and interest of said bonds immediately due and payable, and thereupon proceed to foreclose said mortgage.

That in pursuance of said conspiracy the said defendant company failed and refused to pay the interest on its said bonded indebtedness as it became due, though possessed of abundant means and resources so to do, and permitted and connived and still permits and connives at the said proceedings; that a copy of said scheme and proposed plan of reorganization of said defendant is hereby annexed, marked "Exhibit A," and made a

part of this petition, and that the "certain parties in Fresno" referred to in said "proposed plan of reorganization," are the said John J. Seymour the president, and John S. Eastwood, the engineer of said defendant corporation, and that the said John J. Seymour is the receiver appointed by the court in this action.

That the complainant, The Mercantile Trust Company, had full notice and knowledge at the time it brought the said suit to foreclose said mortgage or trust deed that the purpose of such forclosure was to bring about the reorganization of the said defendant company and not for the enforcement of the collection of the amount due upon said bonds.

That the said scheme for the reorganization of said defendant corporation was conceived and inaugurated and the plan thereof determined upon before default had been made in the payment of interest upon said bonds, or any of them, and that if said scheme and plan of reorganization had not been determined upon on suit would have been requested to be brought by said bondholders or would have been brought by the said Mercantile Trust Company as trustee to foreclose the said mortgage or trust deed, nor would the said officers of said corporation defendant have allowed the interest upon said bonds to become delinquent or to remain unpaid for such time as to entitle the said trustee or said bondholders to elect to declare the principal and interest of said bonds to be due and payable.

That the said defendant San Joaquin Electric Company is and was at the time said default in the payment

of interest accrued, solvent and possessed of ample property, income and resources to meet all of its just debts and liabilities including the interest on said bonds, and said interest might have been and would have been paid out of the ordinary revenues and receipts of said company but for the fraudulent conspiracy above set forth and the purpose and intention of the officers of said defendant company and the said bondholders to bring about the foreclosure of said mortgage and reorganization of said company for the benefit of said bondholders and to the detriment of other bondholders not entering into said scheme.

That by reason of the foregoing facts it is necessary to the protection of your petitioners that they be allowed to intervene and become parties to the said suit to protect their interests as the owners and holders of bonds of said company as aforesaid, and to prevent the sacrifice of the property of the said defendant corporation which is the only security for the payment of said bonds.

Wherefore, your petitioners pray that leave may be granted to them to intervene in the said suit and to file such pleadings in intervention as may be necessary to bring before the court the facts relating to the matters above set forth, and to protect the interests of the petitioners and other bondholders who are not parties to the scheme for the reorganization of the said corporation defendant, and to obtain such relief in the premises as may be just and equitable, and for such other or

further order in the premises as to the court may seem meet and proper.

Dated, 2d March, 1900.

ALFRED Y. CHICK and
WM. FLANDERS LEWIN,
Petitioners.

By GEO. E. CHURCH,
LEWIS A. GROFF,
WORKS & LEE,
Their Solicitors.

Exhibit "A."

To Petition for Cause to Intervene.

PROPOSED PLAN OF REORGANIZATION.

SAN JOAQUIN ELECTRIC COMPANY.

It is proposed to organize a new corporation capitalized as follows:

First.—Capital stock authorized and issued, $750,000.

First mortgage prior lien, 5 per cent 40-year gold bonds.

Authorized issue, $300,000.

Actual immediate issue, $175,000.

Consolidated mortgage, 4 per cent 40-year gold bonds.

Authorized issue, $300,000.

Actual immediate issue, $257,000.

Second.—Of the new securities, the present holders of bonds shall receive for each $1,000 bonds deposited.

New consolidated mortgage, 4 per cent bonds, $600.

Four shares fully paid capital stock, $400.

Third.—Underwriters will be asked to subscribe at 90 for $175,000 prior lien bonds, required for new capital requirements and expenses of reorganization.

For each $900 subscribers will receive 5 per cent prior lien bonds, $1,000.

Twenty shares fully paid capital stock, $2,000.

Fourth.—One hundred thousand dollars of the capital stock will be issued to certain parties in Fresno, for the water rights transferred by them to the old company, providing they facilitate the foreclosure of the mortgage.

Fifth.—Depositing bondholders to have the right to subscribe for new prior lien bonds in proportion to their present holding.

Sixth.—All of the stock subscribed for the underwriters shall be deposited with the American Securities Agency, Limited, so that the control of the company may be permanently in the hands of the representatives of the bondholders.

Seventh.—Inasmuch as the expenses of reorganization will be provided for by the issue of prior lien bonds, no further assessment beyond the ½ per cent already paid will be made.

Kingdom of Great Britain,
and Ireland, } ss.
City of London, England.

Alfred Young Chick, being first duly sworn, on his oath says that he is one of the above-named petitioners in the above and foregoing petition for leave to intervene. That said petitioners are residents of the city of London. That he has read the said petition and knows

the contents thereof and that the allegations therein contained are true.

A. Y. CHICK.

Subscribed and sworn to before me this 2d day of March, 1900.

RICHARD WESTCUTT,

Vice and Deputy Consul-General of the United States of America at London, England.

To the Complainant and Defendant, Their and Each of Their Counsel and Solicitors:

You and each of you will please take notice that on Monday, the 9th day of April, 1900, at 10:30 o'clock A. M., or as soon thereafter as counsel can be heard, and at the courtroom of said Court, at the southeast corner of Main and Winston streets in the city of Los Angeles, State of California, we will present the foregoing petition to the Circuit Court of the United States in and for the Ninth Circuit, Southern District of California, and apply for an order granting the prayer of said petition and allowing the said petitioners Alfred Young Chick, and William Flanders Lewin, to intervene in said cause as prayed for in said petition, and for such other and further order as may be meet and proper in the premises.

Dated March 30, 1900.

GEORGE E. CHURCH,
LEWIS A. GROFF,
WORKS & LEE,

Solicitors for Alfred Young Chick and William Flanders Lewin, Petitioners.

[Endorsed]: Original No. 916. U. S. Circuit Court, Ninth Circuit, Southern District of Calfornia. Mercantile Trust Co., as Trustee, vs. San Joaquin Electric Company. Petition for Leave to Intervene. Received copy of the within March 30, 1900, Chas. Monroe, Solicitor for Complainant. Filed April 2, 1900, Wm. M. Van Dyke, Clerk. Geo. E. Church, L. A. Groff, and Works & Lee, Rooms 420 to 425. Henne Building, Los Angeles, Cal., Solicitors for ———.

In the Circuit Court of the United States, for the Southern District of California.

THE MERCANTILE TRUST COMPANY, Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant.

Answer of The Mercantile Trust Company to Petition and Bill in Intervention of Chick et al.

The answer of The Mercantile Trust Company, complainant herein, to the petition in intervention and bill in intervention of Alfred Young Chick and William Flanders Lewin:

This complainant saving and reserving unto itself all and all manner of benefit or advantage which may be had or taken by reason of the many errors and insuffi-

ciencies in said petition and bill of intervention contained, for answer thereunto and to such parts thereof as this complainant is advised it is material for it to make answer unto, answering says:

This complainant is not informed save by said petition and bill, and therefore can neither admit nor deny whether the petitioners are a partnership existing and doing business as in paragraph I of said petition and bill alleged, or whether they are citizens and residents of the city of London, England, and leave the petitioners to make such proof thereof as they may be advised.

This complainant admits that the defendant San Joaquin Electric Company is a corporation of the State of California, having its principal office and place of business at Fresno, and is a citizen, resident, and inhabitant of the State of California, and of the Southern District thereof; that the complainant is a corporation of the State of New York, having its office and place of business in the city of New York, and is a citizen and resident of said city and State, and that John J. Seymour, receiver, is a citizen and resident of Fresno, California, in the Southern District of said State.

This complainant is not informed save by said petition and bill, whether or not the petitioners are the owners of seventy-eight or any other number of bonds of the defendant Electric Company secured by the mortgage sought to be foreclosed herein, and requires that the petitioners make strict proof in regard thereto.

This complainant admits that on the first day of January, 1899, and the first day of July, 1899, semi-an-

nual installments of interest upon all of the bonds secured by said mortgage or deed of trust sought to be foreclosed herein became due and payable, but this complainant denies upon information and belief that the defendant San Joaquin Electric Company possessed sufficient means or resources to pay said semi-annual installments of interest, or that said installments of interest would have been paid.

Answering the fourth clause or subdivision of said petition and bill, this defendant denies that it entered into any arrangement or conspiracy as alleged in said fourth clause or subdivision of said petition, or that it, its directors or officers had knowledge of any scheme such as is alleged in said petition and bill, or that the purpose of the foreclosure was to bring about the reorganization of defendant company, and not for the collection of the amount due on said bonds, or that said complainant, its officers or directors were to profit therefrom, or that they were to further said scheme or arrangement, and this complainant on information and belief denies each and every other allegation contained in said fourth clause or paragraph of said petition and bill.

This defendant denies each and every allegation contained in the fifth clause or paragraph of said petition and bill.

On information and belief, this complainant denies each and every allegation contained in the sixth clause or subdivision of the said bill and petition.

Without this that any other matter or thing in said petition and bill contained and not herein sufficiently answered, traversed or denied is true to the knowledge or belief of this complainant.

And now this complainant having fully answered said petition and bill prays to be hence dismissed with its costs in this behalf most unjustly incurred.

THE MERCANTILE TRUST COMPANY,
By ALEXANDER & GREEN, and
CHAS. MONROE,
Solicitors.

[Endorsed]: No. 916. U. S. Circuit Court, Southern District of California. The Mercantile Trust Company, as Trustee, against San Joaquin Electric Company. Original. Answer of Mercantile Trust Company to Petition and Bill in Intervention of Chick, et al. Filed April 23, 1900, Wm. M. Van Dyke, Clerk.

At a stated term, to wit, the January Term, A. D. 1900, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, held at the court-room in the city of Los Angeles, on Monday, the twenty-third day of April, in the year of our Lord, one thousand nine hundred. Present: The Honorable OLIN WELLBORN, District Judge.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant.
No. 916.

Order Denying Application for Leave to File Answer and Granting Leave to Intervene.

This cause coming on to be further heard on the petition of Alfred Young Chick and William Flanders Lewin for an order allowing the said petitioners to intervene in said cause as prayed for in said petition, Chas. Monroe, Esq., appearing as counsel for complainant, and John D. Works, Esq., appearing as counsel for petitioners, and complainant by its said counsel having applied to the Court for leave to file the answer of Mercantile Trust Company, to petition and bill in intervention of Chick et al., it is now by the Court ordered that said application for leave to file said answer be, and the same hereby is denied; it is further ordered that the petition of Alfred Young Chick, and William Flanders Lewin for an order allowing the said petitioners to intervene in said cause as prayed for in said petition be, and the same hereby is granted, and the bill of intervention and answer of Alfred Young Chick and William Flanders Lewin is thereupon filed in said cause.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant.

Bill in Intervention and Answer of Alfred Young Chick and William Flanders Lewin.

To the Judges of the United States Circuit Court, Ninth Circuit, Southern District of California:

Your intervenors, Alfred Young Chick and William Flanders Lewin, doing business under the firm name and style of A. Y. Chick & Co., citizens and residents of the Kingdom of Great Britain, file this, their bill of intervention herein against the complainant, the Mercantile Trust Company, as trustee, the defendants, San Joaquin Electric Company, John J. Seymour, the receiver appointed by the Court herein, and John S. Eastwood, and its answer to the bill of complaint of the complainant, the Mercantile Trust Company, and respectfully show to the Court:

I.

That your intervenors are citizens and residents of the Kingdom of Great Britain, and were such at the time this action was commenced.

That the complainant, the Mercantile Trust Company, is a corporation organized and existing under and by virtue of the laws of the State of New York, and having its office and place of business in the City of New York, in said State, and is a citizen and resident of said State.

That the defendant, the San Joaquin Electric Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business at Fresno, in Fresno county, State of California, and said John J. Seymour was, at the time this action was commenced, and still is, a resident and citizen of the State of California and of said district.

Your intervenors further show to your Honors as follows:

They admit that on or about the 1st day of July, 1895, the defendant made, executed, and issued its certain sixteen hundred (1,600) bonds, each for the principal sum of five hundred dollars ($500.00), and for the principal sum in the aggregate thereof of eight hundred thousand dollars ($800,000.00), each bearing date the 1st day of July, 1895, wherein and in each of said bonds the said defendant, for value received, promised to pay to the bearer the sum of five hundred dollars ($500.00), in gold coin of the United States of America, of the then standard of weight and fineness, on the 1st day of July, 1915, at the office of the complainant, in the city of New York, together with interest thereon at the rate of six (6) per cent per annum, payable semi-annually in like

gold coin, on the 1st days of January and July in each year, on presentation and surrender of the interest coupons attached to said bonds, as they severally should become due, said interest also being payable at the office of said complainant.

They admit that in order to secure the payment of the principal and interest of said bonds, the said defendant, on or about the 1st day of July, 1895, made, executed, and delivered to the complainant as trustee a certain mortgage or deed of trust, dated on that day, wherein and whereby it granted, bargained, sold, assigned, set over, released, aliened, conveyed and confirmed unto said complainant and its assigns and successors, in trust, for the purposes in said mortgage set forth, the property described in the third paragraph of the bill of complaint herein, to have and to hold all such property and all other possession, franchises, and claims acquired or to be acquired, and all other premises in said mortgage expressed to be conveyed and assigned unto the use of said complainant and its successors in interest, according to the manner, terms and effect in said mortgage expressed of and concerning the same, for the benefit, protection and security of the persons holding the said bonds, or any of them; that said mortgage or deed of trust was duly recorded in the proper offices in the counties in which the property described therein and thereby conveyed, or intended so to be, was situated, a copy of which mortgage is annexed to and made a part of the bill of complaint herein.

They admit that of the bonds provided to be issued under and secured by said mortgage or deed of trust, or intended so to be, eleven hundred ten (1,110) bonds, numbered from one (1) to eleven hundred ten (1,110), inclusive, for the principal sum in the aggregate of five hundred fifty thousand dollars ($550,000.00), were duly executed and issued by the said defendant, and were certified by said complainant as trustee under said mortgage or deed of trust, and that the same are now outstanding in the hands of bona fide holders thereof for value.

They admit that in and by the said mortgage or deed of trust it was, among other things, provided that in case the said defendant or its successors should make default in the payment of any interest on any of said bonds, according to the tenor thereof, the payment thereof having been demanded according to the terms thereof, or should make a breach of any of the covenants or agreements in said mortgage contained by it to be done or performed, and such default or breach should continue for the period of six (6) months, that then and thereupon the principal of all of said bonds then outstanding and unpaid might, at the election of the trustee, or at the request of one-tenth (1-10) of the amount of bonds then outstanding and secured thereby, become immediately due and payable.

They admit that in and by said mortgage or deed of trust, it was further provided that if the defendant or its successors should make default in the payment of the principal or any part thereof, or any installment of

interest, or any part thereof, and such default should continue for the space of six (6) months after maturity and demand therefor, it should be the duty of the trustee, upon request and indemnification in said mortgage provided, to proceed in any proper court to foreclose said mortgage, and that the said trustee, the complainant herein, should be entitled to the appointment of a receiver and specific performance of all the covenants therein contained, and said trustee might, in case of default, apply to any court having competent jurisdiction, for instructions as to the matters not therein expressly provided for.

They admit that on or about the 1st day of January, 1899, there fell due a semi-annual installment of interest upon said bonds, represented by the coupons attached thereto, amounting to the sum of sixteen thousand six hundred fifty dollars ($16,650.00), which amount of interest the defendant refused and neglected to pay; but deny that payment thereof was duly or at all demanded, and that a like default occurred on the 1st day of July, 1899; but your intervenors allege that said default was the result of collusion between the said defendant and its officers in charge of its business and the holders and owners of certain of the bonds of said defendant, and the same owners and holders of bonds who have caused this suit to be instituted, and for the purpose of bringing about an unnecessary reorganization of said company and its affairs, to the detriment of your intervenors and other of the bondholders of said defendant, not parties to said collusion or

scheme of reorganization; and they further aver that the said defendant was fully able to pay the said installments of interest, as they fell due, out of the earnings and funds of said company, and that no proper demand for the payment of said interest was ever made.

They admit that the said default continued for a period of more than six (6) months, but deny that the complainant was requested by the holders of more than a majority of the bonds outstanding and secured by said mortgage or deed of trust, or intended so to be, under the power and authority given to it by said mortgage or deed of trust, to declare or that the complainant elected or declared that the principal of all the bonds then outstanding and unpaid should become immediately due and payable, or that it served notice of such election upon the defendant.

They deny that the defendant, San Joaquin Electric Company, is insolvent, or wholly or at all unable to pay its present or presently accruing indebtedness or liabilities, or the interest on said bonds now due, or that the property covered by the said mortgage or deed of trust, or intended so to be, is slender or insufficient security for the payment of said indebtedness.

They deny that in addition to the amount represented by the said bonds and coupons, the said defendant is indebted to sundry or diverse persons in large sums, which debts, or any of them, have been incurred in the operation of the business of the said defendant, or which debts the said defendant is wholly or at all unable to pay.

They deny that by reason of the insolvency of the said defendant, or for any other reason, it is necessary for the proper protection of the holders of the bonds and coupons secured by the mortgage or deed of trust given to the complainant, as aforesaid, that a receiver or receivers of the property of the said defendant, San Joaquin Electric Company, should be appointed, with the powers given to such receiver or receivers in like cases under the course and practice of this court, or at all.

They admit that the matter in controversy herein exceeds five thousand dollars ($5,000.00), exclusive of interest and costs.

And your intervenors further allege and show to your Honors that the defendant, John J. Seymour, was by your Honorable Court appointed receiver of the property and business of the said defendant, upon the application of the said complainant, in said cause, and is now acting as such receiver, and as such receiver has possession of the property of the said defendant described and set forth in the bill of complaint of said complainant in said suit, and has the full control and management of the business of said defendant, and the defendant, John S. Eastwood, is now, and was at the times hereinafter mentioned, an officer and engineer of the said defendant company, and is now acting as such engineer under the said receiver.

That your intervenors are now, and have been for a long time, and were before the commencement of this suit, the owners of seventy-eight (78) of the said bonds of the said defendant, San Joaquin Electric Company, being a

part of the same series of bonds described in paragraph II of the complainant's bill of complaint, and secured by the mortgage or deed of trust described in said bill; that on or about the 1st day of January, 1899, there fell due a semi-annual installment of interest on said bonds so held and owned by said intervenors, which said interest is represented by the coupons attached thereto, amounting to the sum of one thousand one hundred seventy dollars ($1,170.00), which amount of interest the said San Joaquin Electric Company neglected to pay, although possessed of abundant means and resources so to do, and that a like default occurred on the 1st day of July, 1899, and said installment of interest would have been paid, as your intervenors are informed and believe, had not the scheme hereinafter set out been entered into.

That in the month of January, 1899, the said defendant, The San Joaquin Electric Company, had and possessed ample means, income and resources to meet all of its just debts and liabilities due and to become due, including the accrued and accruing interest on all of its said bonds; but instead of applying its said means to the payment of its obligations, including the said interest, its officers and directors, including the said John J. Seymour and John S. Eastwood, conspired together for the purpose of diverting, and did unlawfully and fraudulently divert its funds to other purposes, and purposely and intentionally avoided paying the interest on said bonds, for the fraudulent and unlawful purpose of enabling certain of the bondholders of said company as hereinafter alleged, to bring and maintain a suit to foreclose the mortgage or deed of trust

securing the bonds of said company, and to carry out a scheme entered into by said bondholders and said officers of said company to re-organize the said company, to the detriment and injury of the said company and other of the bondholders thereof, and that the said officers of said company and the said bondholders unlawfully and fraudulently conspired together to induce the complainant, the Mercantile Trust Company, as trustee, and its officers, to foreclose the said mortgage or trust deed by suit against said defendant company, with the object and purpose of carrying out said scheme for the re-organization of said company in the interest of said bondholders and said officers of the defendant company; and in pursuance of said unlawful and fraudulent scheme, the officers of said company, having laid the foundation for the right of said trustee to foreclose said mortgage or deed of trust, or attempted so to do, the said bondholders, for the purpose of bringing about said foreclosure and re-organization, and being sufficient in numbers to authorize them so to do, under the terms of said mortgage or trust deed, requested or caused the said trustee to be requested by their agent or agents to bring suit to foreclose the said mortgage and sell the property of the defendant company described therein, not for the purpose of enforcing the collection of the amount due from said defendant to its bondholders, but for the sole purpose of bringing about such re-organization of said company in the interests of the bondholders requesting such foreclosure, and with the view and for the purpose of destroying the value of the bonds held by these intervenors and others similarly sit-

uated, it being fraudulently agreed between the said bondholders and said John J. Seymour, President of said defendant company, and John S. Eastwood, engineer thereof, that if the said officers of said company would facilitate the foreclosure of said mortgage, the said officers should have and receive one hundred thousand dollars ($100,000.00) of the stock of the corporation to be organized, as a part of said scheme of re-organization, and said officers in consideration of the said promises of stock of said new corporation to be organized, did facilitate the foreclosure of said mortgage by fraudulently and purposely and unnecessarily allowing the interest upon the said bonds to become and continue delinquent for the term of six (6) months, whereby the right of the said trustee to foreclose the same became and was perfect, according to the terms of the said mortgage or deed of trust; and that it was further agreed and understood as a part of the said scheme of foreclosure and re-organization that the said John J. Seymour, president of said defendant company, should be and he was, in pursuance of said agreement, appointed the receiver in the suit to foreclose said mortgage, as before alleged, upon the request of the said bondholders; and said president and engineer of said defendant corporation are now, and have been, acting in collusion with said bondholders to bring about the foreclosure and sale of the property of said defendant corporation for the benefit of said bondholders, who have inaugurated and are carrying out said scheme of re-organization and for the purpose and with the object of destroying the value of the security held by these intervenors and other bondholders similarly situated.

That the foreclosure proceedings in this action were conceived, commenced, and are being prosecuted in furtherance of said scheme for the re-organization of said defendant corporation; that the said scheme was contrived by and between the said bondholders, at whose suggestion, instigation and request, as alleged in the bill of complaint, this action was begun, and the officers and directors of said defendant corporation; that it was contrived and agreed by and between the parties to this action and said bondholders, at whose instigation the said foreclosure proceedings were begun as aforesaid, that the said defendant company should default in payment of interest on its bonds; that the said trustee, the complainant in said suit, should thereupon elect to declare the entire principal and interest of said bonds immediately due and payable, and thereupon proceed to foreclose said mortgage.

That in pursuance of said conspiracy, the said defendant company failed and refused to pay the interest on its said bonded indebtedness as it became due, though possessed of abundant means and resources so to do, and permitted and connived at, and still permits and connives at said proceedings; that the said scheme and proposed plan of re-organization of the defendant company was as follows:

PROPOSED PLAN OF RE-ORGANIZATION.

SAN JOAQUIN ELECTRIC COMPANY.

It is proposed to organize a new corporation capitalized as follows:

First.—Capital stock authorized and issued, $750,000.

First mortgage prior lien 5 per cent 40-year gold bonds. Authorized issue, $300,000.

Actual immediate issue, $175,000.

Consolidated mortgage, 4 per cent 40-year gold bonds.

Authorized issue, $300,000.

Actual immediate issue, $257,000.

Second.—Of the new securities, the present holders of bonds shall receive for each $1,000 bonds deposited.

New consolidated mortgage 4 per cent bonds, $600.

Four shares fully paid capital stock, $400.

Third.—Underwriters will be asked to subscribe at 90 for $175,000 prior lien bonds, required for new capital requirements and expenses of re-organization.

For each $900 subscribers will receive 5 per cent prior lien bonds, $1,000.

Twenty shares fully paid capital stock, $2,000.

Fourth.—One hundred thousand dollars of the capital stock will be issued to certain parties in Fresno, for the water rights transferred by them to the old company, providing they facilitate the foreclosure of the mortgage.

Fifth.—Depositing bondholders to have the right to subscribe for new prior lien bonds in proportion to their present holding.

Sixth.—All of the stock subscribed for by underwriters shall be deposited with the American Securities Agency, Limited, so that the control of the company may be permanently in the hands of the representatives of the bondholders.

Seventh.—Inasmuch as the expenses of reorganization will be provided for by the issue of prior lien bonds, no further assessment beyond the one-half per cent already paid will be made."

And your intervenors further allege and show that the "certain parties in Fresno" referred to in said "proposed plan of re-organization" were the said John J. Seymour, the president, and John S. Eastwood, the engineer of said defendant corporation, and that the said John J. Seymour is the receiver appointed by the Court in this action.

That the complainant, The Mercantile Trust Company, had full notice and knowledge, at the time it brought the said suit to foreclose said mortgage or trust deed, that the purpose of such foreclosure was to bring about the re-organization of the said defendant company, and not for the enforcement or the collection of the amount due upon said bonds. That the said plan for the re-organization of said defendant corporation was conceived and inaugurated and the plan thereof determined upon, before default had been made in the payment of interest upon said bonds, or any of them, and that if said plan and scheme of re-organization had not been determined upon, no suit would have been requested to be brought by said bondholders, or would have been necessary, or would have been brought by said Mercantile Trust Company as trustee, to foreclose the said mortgage or trust deed, nor would the said officers of said corporation defendant have allowed the interest upon said bonds to become delinquent, or to remain unpaid for such time as to entitle the said trustee or said bondholders to elect to declare the principal and interest of said bonds to be due and payable.

That the said defendant, San Joaquin Electric Company, is, and was at the time said default in the payment of interest occurred, solvent, and possessed of ample proper-

ty, income and resources to meet all of its just debts and liabilities, including the interest on said bonds, and said interest might have been, and would have been paid out of the ordinary revenues and receipts of said company, but for the fraudulent conspiracy above set forth, and the purpose and intention of the officers of said defendant company, and said bondholders to bring about the foreclosure of said mortgage and the re-organization of said company for the benefit of said bondholders, and to the detriment of other bondholders not entering into said scheme.

That for the reasons above stated, the bringing of this suit was wholly unnecessary, has involved the bondholders of said company in unnecessary costs and expenses, has reduced the value of the security of the said bondholders, and has been otherwise detrimental to the interests of your intervenors and other of the bondholders of said company.

Wherefore, your intervenors pray your Honors that the bill of complaint herein be dismissed; that the receiver, John J. Seymour, appointed by your Honors, be discharged; that he be ordered and directed to immediately account to this Court for his management of the property of the defendant company, and pay over all funds received by him as such receiver, that said John J. Seymour, as the President of said defendant company, be required to apply the receipts and revenue of said defendant to the payment of the interest accrued upon the bonds described and set forth in the bill of complaint herein; that the said John J. Seymour and John S. Eastwood and said defend-

ant company be perpetually enjoined from carrying out the scheme of re-organization set forth, or any re-organization of the said company, and for such other relief in the premises as may to your Honors seem just and equitable.

ALFRED Y. CHICK,
WM. FLANDERS LEWIN,
Intervenors.
By GEO. E. CHURCH,
LEWIS A. GROFF,
WORKS & LEE,
Their Solicitors.

[Endorsed]: Original. No. 916. U. S. Circuit Court, Ninth Circuit, Southern District of California. Mercantile Trust Company, as Trustee, vs. San Joaquin Electric Company. Bill of Intervention and Answer of A. Y. Chick and W. F. Lewin. Received copy of the within April 20, 1900. Alexander & Green and Chas. Monroe, Solicitors for Mercantile Trust Co. L. L. Cory, Solicitor for other Defendants, to Bill in Intervention. Filed April 23, 1900. Wm. M. Van Dyke, Clerk. G. E. Church, L. A. Groff and Works & Lee, Rooms 420 to 425, Henne Building, Los Angeles, Cal., Solicitors for Intervenors.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant.
vs.
THE SAN JOAQUIN ELECTRIC COMPANY,
Defendant.

Notice of Motion to Strike.

To Works & Lee, Geo. E. Church and Lewis A. Groff, Solicitors for Intervenors, Alfred Young Chick and William Flanders Lewin, Intervenors:

You and each of you, are hereby notified that the complainant will on Monday, the 7th day of May, 1900, at 10:30 o'clock A. M., of said day, or as soon thereafter as counsel can be heard, at the courtroom of this Court in the Federal Building in the city of Los Angeles, county of Los Angeles, State of California, move the Court to strike out from the paper filed by said intervenors so much thereof as purports to be, or is set up therein, as an answer to the original bill herein, for the reasons that no leave has been given by the Court to file any answer in the cause and because so much of said paper as purports to be an answer to the original bill was filed without authority.

You are hereby further notified that said motion will be made upon the papers and files of the Court herein.

Dated May 3d, 1900.

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for Complainant.

[Endorsed]: Original. No. 916. Circuit Court of the United States, Ninth Circuit, Southern District of California. The Mercantile Trust Company, as Trustee, Complainant, vs. The San Joaquin Electric Company, Defendant. Notice. Received copy of the within this 3d day of May, 1900. Works & Lee, Attorneys for Intervenors, Chick & Lewin. Filed May 3, 1900. Wm. M. Van Dyke, Clerk. By E. H. Owen, Deputy. Chas. Monroe, Attorney at Law, Tel. Main 706, Los Angeles, Cal., 415-416 Douglas Building, Attorneys for Complainant.

At a stated term, to wit, the January term, A. D. 1900, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, held at the courtroom in the city of Los Angeles, on Monday, the twenty-first day of May, in the year of our Lord one thousand nine hundred. Present: The Honorable ERSKINE M. ROSS, Circuit Judge.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
THE SAN JOAQUIN ELECTRIC COMPANY,
Defendant.
No. 916.

Order Striking Out Parts of Bill in Intervention and Answer of A. Y. Chick et al.

This cause coming on this day to be heard on the motion of complainant to strike out from the paper filed by the intervenors entitled "Bill in intervention and answer of A. Y. Chick and W. F. Lewin," so much thereof as purports to be or is set up therein, as an answer to the original bill herein, Chas. Monroe, Esq., appearing as counsel for complainant, and no counsel appearing in opposition thereto, now, on motion of said Chas. Monroe, Esq., of counsel for complainant, it is ordered that the words "and answer" in line 8, and the words "and its answer to the bill of complaint of the complainant, The Mercantile Trust Company," in lines 22 and 23 of page 1 of said paper, and the words "& answer," endorsed on said paper be, and the same hereby is struck out.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
THE SAN JOAQUIN ELECTRIC COMPANY,
Defendant.
No. 916.

Notice of Motion to Strike.

To Works & Lee, Geo. E. Church and Lewis A. Groff, Solicitors for Intervenors, Alfred Young Chick and William Flanders Lewin, Intervenors:

You and each of you are hereby notified that the complainant will on Monday, the 28th day of May, 1900, at 10:30 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, at the courtroom of this Court in the Federal Building in the city of Los Angeles, County of Los Angeles, State of California, move the Court to strike out from the paper filed by said intervenors as a bill in intervention so much thereof as purports to be or is set up therein as an answer to the original bill herein, and particularly to strike out from and including line nine page two to and including the last line at bottom of page five, for the reason that no

leave has been given by the Court to file any answer in the cause and because so much of said paper as purports to be an answer to the original bill was filed without authority, and for the further reason that it is irregular and improper for an answer and bill to be contained in the same paper, and because the paper filed asks for affirmative relief and the intervenors have no right to ask for affirmative relief in an answer.

You are hereby further notified that said motion will be made upon the papers and files of the Court herein.

Dated May 24th, 1900.

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for Complainant.

[Endorsed]: Original. No. 916. Circuit Court of the United States, Ninth Circuit, Southern District of California. The Mercantile Trust Company, as Trustee, Complainant, vs. The San Joaquin Electric Company, Defendant. Notice of Motion. Received copy of the within this 24th day of May, 1900, Works & Lee, Attorneys for Intervenors. Filed May 24, 1900. Wm. M. Van Dyke, Clerk. Chas. Monroe, Attorney at Law, Tel. Main 706, Los Angeles, Cal., 415-416 Douglas Building, Attorney for Complainant.

In the Circuit Court of the United States, for the Southern District of California, in the Ninth Circuit.

IN EQUITY.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant.
No. 916.

Answer of The Mercantile Trust Company to Bill in Intervention of A. Y. Chick et al.

The answer of The Mercantile Trust Company, the complainant above named, to the bill of intervention filed herein on behalf of Alfred Young Chick and William Flanders Lewin.

This complainant saving and reserving unto itself all and all manner of benefit and *advantage may* be had or taken in the way of exception or otherwise to the many errors and insufficiencies in said bill of intervention contained, for answer thereto, or such parts thereof as this complainant is advised it is material or necessary for it to make answer unto, answering says:

This complainant is not informed save by said bill of intervention whether or not the intervenors therein named are citizens and residents of the Kingdom of Great Britain, and can therefore neither admit nor deny the same.

Complainant admits that the complainant is a corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business in the city of New York, and is a citizen and resident of said State, and that the defendant San Joaquin Electric Company, is a corporation of California, having its principal office and place of business at Fresno, in said State, and that John J. Seymour was at the time of the commencement of the above-entitled action and still is a citizen and resident of the State of California and of the Southern District thereof.

This complainant denies that the default which occurred on the first days of January and July, 1899, in the payment of the semi-annual installment of interest upon the bonds secured by the mortgage or deed of trust sought to be foreclosed in this action, was the result of collusion between the said defendant and its officers in charge of its business and the holders and owners of certain or any of the bonds of said defendant as alleged in said bill of intervention, and this complainant is informed and believes that the allegation contained in said bill of intervention that said default was brought about and this action was instituted for the purpose of bringing about an unnecessary re-organization of the company defendant to the detriment of the intervenors in said bill or of other bond holders of said defendant Electric Company not parties to said alleged collusion or scheme of reorganization is untrue, and it therefore denies said allegation. And this complainant further denies, upon its information and belief, that the said defendant was at the time said install-

ments of interest fell due able to pay the same out of the earnings or funds of said company. And this complainant re-asserts and re-alleges all of the allegations made by it in its bill of complaint heretofore filed herein.

This complainant admits that John J. Seymour was by this court appointed receiver of the property of said defendant covered by the mortgage or deed of trust sought to be foreclosed herein upon the application of this complainant, and as complainant is informed and believes is now acting as such receiver, and as such receiver is in possession of the property of the defendant Electric Company described and set forth in the bill of complaint in this suit.

This complainant also admits that John S. Eastwood is now employed by said Seymour as receiver, but in what capacity he is so employed, or to what extent his services have been required by the receiver, this complainant is not advised and leaves the intervenors to make such proof as they may be advised is necessary or proper.

This complainant is not advised save by said bill of intervention and therefore can neither admit nor deny that the intervenors are the holders of seventy-eight or of any number of the bonds of the defendant, Electric Company, or as to the amount of interest which fell due upon said bonds or any bonds held or claimed to be held by said intervenors, but this complainant admits that the defendant Electric Company made default in the payment of interest upon all of the bonds secured by the mortgage or deed of trust sought to be foreclosed herein as hereinbefore alleged, upon the first days of January and July, 1899.

This complainant denies, upon its information and belief, that in the month of January, 1899, the defendant Electric Company had and possessed ample and sufficient means, income and resources to meet all of its just debts and liabilities due and to become due, including the accrued and accruing interest on all of its bonds, and upon information and belief, further denies that the officers and directors, including the said Seymour and said Eastwood, conspired together for the purpose of diverting, and did unlawfully and fraudulently divert its funds to other purposes, or purposely or intentionally avoided paying the interest upon said bonds, for the purpose of enabling certain bondholders of said company to bring and maintain a suit to foreclose the mortgage or deed of trust, and to carry out a scheme of reorganization as alleged in said bill of intervention, or any other scheme of like character to the detriment and injury of the company and other of the bondholders thereof, and upon its formation and belief, denies that the officers of said company and said bondholders unlawfully and fraudulently conspired together to induce the complainant and its officers to foreclose said mortgage or deed of trust, with the object and purpose of carrying out any scheme for the reorganization of the said defendant Electric Company in the interest of said bondholders and said officers of said defendant Electric Company.

This complainant admits that it was requested to bring suit to foreclose the mortgage or deed of trust as alleged in the bill of complaint herein, but denies that such suit was brought or, as far as complainant is informed and

verily believes, such action was requested in pursuance of any unlawful and fraudulent scheme looking toward the injury of any interests of any of the holders of the bonds secured by the mortgage or deed of trust sought to be foreclosed herein, or to the preference of any one holder over any of the other holders of said bonds, nor for the purpose of destroying the value of the bonds held by the intervenors and others similarly situated, if any. And this complainant denies that it has any knowledge or information as to any fraudulent agreement between said bondholders and said Seymour and Eastwood, if any such existed, to the effect that said Seymour and Eastwood should have and receive $100,000 in the stock of the corporation to be organized, as a part of the scheme of reorganization, or any part thereof, or that said officers in consideration of the said promises did facilitate the foreclosure of the said mortgage by fraudulently and purposely and unnecessarily allowing the interest upon said bonds to become and continue delinquent for the term of six months. This complainant admits that the said John J. Seymour was, upon the request of this complainant, appointed receiver of the mortgaged property in the above-entitled suit, but denies that such request was made by this complainant for the purpose and with the object of destroying or in any way impairing the security held by the intervenors or other bondholders similarly situated, if any, or for any other purpose than the proper protection of the interests of the holders of all the bonds secured by the mortgage or deed of trust sought to be foreclosed herein and for the preservation of the property

covered thereby; and on information and belief, denies that the request of the bondholders to this complainant as trustee to suggest the name of said Seymour as receiver was so made to this complainant for the purpose and with the object of destroying the value of the security held by the intervenors or other bondholders similarly situated if any, or the value of the security of the holders of any of the bonds secured by the mortgage or deed of trust sought to be foreclosed herein.

This complainant denies that the foreclosure proceedings in this action were conceived, commenced and are being prosecuted in furtherance of any scheme for the reorganization of said defendant Electric Company; but to the contrary thereof, this complainant alleges that said proceedings were commenced and are being prosecuted in the interest and for the protection of the property and security of the holders of all of the bonds secured by the said mortgage or deed of trust. And this complainant denies that it was contrived and agreed to by and between the parties to this action and the said bondholders at whose request the foreclosure proceedings were begun that the said defendant Electric Company should default in the payment of interest upon its bonds. And this complainant alleges that said default in the payment of said interest had occurred prior to the time when any request for foreclosure or other action on the part of the complainant as trustee had been made upon it by any of the holders of the bonds secured by the mortgage or deed of trust sought to be foreclosed herein. And this complainant expressly denies that the declaration that the

entire amount of principal and interest should immediately become due and payable and the institution of said foreclosure suit were made through any contrivance or agreement by and between this complainant and the defendant company and any of the holders of the bonds secured by the mortgage or deed of trust sought to be foreclosed herein, but alleges that such action was solely based upon the fact that a default in the payment of interest and a breach of the covenants contained in said mortgage or deed of trust had acutally been made and had occurred prior to such declaration and action by said complainant as trustee, and upon the inability and refusal of the defendant company to pay said interest.

And complainant denies that in pursuance of said or any like conspiracy the said defendant company failed and refused to pay the interest upon its bonded indebtedness when it became due, and expressly denies upon information and belief, that said company was possessed of abundant means and resources so to do; but to the contrary thereof, this complainant upon information and belief alleges that at the time of said defaults the said company was wholly unable to pay the interest accruing upon said several dates.

This complainant is not informed save by said bill of intervention and therefore can neither admit nor deny whether any plan of reorganization of the defendant Electric Company has been proposed, or whether the alleged plan of reorganization as set forth in said bill of intervention is a correct copy of a proposed plan of reorganization of said defendant company, and requires the said

intervenors to make strict proof of the allegations in that respect in said bill of intervention contained.

This complainant is not informed save by said bill of intervention and can therefore neither admit nor deny whether "certain parties in Fresno" referred to in the proposed plan of reorganization in said bill set forth, were said Seymour and Eastwood, and leaves intervenors to make such proof of such allegation as they may be advised is material or necessary.

This complainant absolutely denies that it had full or any knowledge or notice at the time the above suit to foreclose was commenced that the purpose of such foreclosure was to bring about the reorganization of said defendant Electric Company and not for the enforcement of the collection of the amount due upon said bonds; and this complainant alleges to the contrary thereof that its sole object and purpose in instituting and prosecuting the said suit for the foreclosure of said mortgage or deed of trust was for the enforcement of the collection of the amount due upon said bonds and coupons and for the protection of the interests of the holders of all the bonds issued under and secured by said mortgage or deed of trust.

This complainant is not informed save by said bill of intervention and can therefore neither admit nor deny the allegations therein contined that the plan of reorganization, if any, of said defendant Electric Company, was conceived and inaugurated, and determined upon, before default was made in the payment of interest upon said bonds or any of them, and that if the alleged plan

and scheme of reorganization had not been determined upon no such suit would have been brought by said bondholders or would have been brought by said complainant as trustee to foreclose said mortgage, and requires that the intervenors make strict proof of such allegation.

This complainant denies, upon information and belief, the allegation that the officers of the defendant Electric Company have allowed the interest upon the bonds to become delinquent or to remain unpaid for such time as to entitle the complainant as trustee or said bondholders to elect to declare the principal and interest of the bonds to be due and payable.

Upon information and belief, this complainant denies the allegations in said bill of intervention contained that the defendant Electric Company is, and was at the time when the default occurred solvent and possessed of ample property, income and resources to pay its just debts and liabilities, including the interest on said bonds, or that such interest might have been or would have been paid out of the ordinary revenues and receipts of said company but for the conspiracy alleged in said bill of intervention, and alleged purpose and intention of the officers of the defendant company and the bondholders to bring about a foreclosure of the mortgage and a reorganization of the said defendant Electric Company for the benefit of said bondholders and to the detriment of any bondholders not entering into the alleged scheme of reorganization; but re-asserts and re-alleges upon information and belief as hereinbefore alleged, that at the time of said defaults the said defendant company was and still is wholly unable

to pay out of its income and resources the interest falling due upon the several dates upon which said defaults occurred.

And this complainant, upon information and belief, denies that the bringing of this suit was wholly unnecessary or that it has involved the bondholders of said defendant Electric Company in unnecessary costs and expenses, or has reduced the value of the security of the said bondholders, or has been in anywise detrimental to the interests of the intervenors or of any other persons as holders of the bonds secured by said mortgage or deed of trust; but to the contrary thereof, this complainant alleges that said suit was brought by this complainant as trustee in good faith and for the necessary and proper protection of the interests of the holders of the said bonds, and so far as this complainant is informed and verily believes, that the request made to this complainant to institute said suit was made by the holders of the bonds making the same in good faith, and for no other purpose than for the protection of the interests of the holders of all the bonds secured by said mortgage or deed of trust, or intended so to be.

Without this that any other matter or thing in said bill of intervention contained and not herein sufficiently admitted, answered, traversed or denied, is true to the knowledge of complainant; and now having fully answered, this complainant prays that the said bill of intervention may be dismissed, and that said complainant may have and recover of said intervenors its costs in this

behalf most wrongfully incurred, and for such other and further relief as to the court may seem meet.

THE MERCANTILE TRUST COMPANY,
H. C. DEMING,
T. P. L.
ALEXANDER & GREEN, and
CHAS. MONROE,
Solicitors for Complainant.

United States of America,
Southern District of New York. } ss.

Henry C. Deming, being duly sworn, says, that he is an officer, to wit, the vice-president of The Mercantile Trust Company, the complainant named in the foregoing answer; that he has read the said answer and knows the contents thereof; that the allegations therein contained so far as they relate to his own acts are true, and, so far as they relate to the acts of others, he believes them to be true.

H. C. DEMING.

Sworn to before me this 29th day of May, 1900.

[Seal] ISAAC MICHAELS,
Notary Public, New York County, N. Y. No. 65.

[Endorsed]: No. 916. In the U. S. Circuit Court, Southern District of California, Ninth Circuit. In Equity. The Mercantile Trust Company, as Trustee, against San Joaquin Electric Company. Answer of Complainant to Bill of Intervention, filed on behalf of Alfred YoungChick

and William Flanders Lewin. Received copy of within this 6th day of June, 1900. Geo. Church, L. A. Groff. Filed June 6, 1900. Wm. M. Van Dyke, Clerk. Alexander & Green, Solicitors for Complainant. Works & Lee, Solicitors for Intervenors.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant.
No. 916.

Answer of San Joaquin Electric Company to Bill of Complaint of Mercantile Trust Company.

The answer of the San Joaquin Electric Company, the defendant above named, to the bill of complaint filed herein on behalf of The Mercantile Trust Company, complainant:

This defendant saving and reserving unto itself all and all manner of benefit and advantages which may be had or taken in the way of exception, or otherwise, to the many errors and insufficiencies in said bill of complaint contained, for answer thereto, or such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering says:

This defendant admits all the allegations contained in paragraphs 1, 2, 3, 4, 5, and 6 are true and correct.

That on the first day of January, 1899, there fell due a semi-annual installment of interest upon said bonds represented by the coupons attached thereto, amounting to the sum of $16,650. That this defendant had no funds or means with which to pay said installment of interest, and therefore was compelled to refuse, and did refuse, and neglect to pay the same, and that a like condition existed on the first day of July, 1899. That the only reason why this defendant neglected and refused to pay said respective installments of interest was because of lack of funds, and its inability to raise sufficient money wherewith to pay the same.

Said defendant admits that it was at the time of the commencement of this action, insolvent and unable to pay its present or presently accruing indebtedness and liabilities as well as the principal and interest of said bonds and that it did not have at the time said installment of interest became due, or at the time of the commencement of this action, sufficient money with which to pay said installment as well as its ordinary and current running expenses and claims and demands upon it other than those represented by its said bonded indebtedness.

Wherefore defendant prays that the Court enter such order and decree in the premises as may seen to it fit and proper under the circumstances as presented by the bill and this answer.

BICKNELL, GIBSON & TRASK,
Attorneys for said Defendant.

State of California, }
County of Fresno. } ss.

J. M. Collier, being first duly sworn, deposes and says, That he is an officer, to wit, secretary of the defendant corporation above named, that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and that as to those matters that he believes it to be true.

J. M. COLLIER.

Subscribed and sworn to before me this 12th day of June, 1900.

[Seal] A. HARVEY,

Notary Public in and for the County of Fresno, State of California.

[Endorsed]: Orig. No. 916. U. S. Circuit Court, Ninth Circuit, Southern District of California. Mercantile Trust Co., as Trustee, Complainant, vs. San Joaquin Electric Co., Defendant. Answer to Bill of Complaint. Received copy of the within answer this 13th day of June, 1900, Chas. Monroe. By D. H. McDonald. Filed June 13, 1900. Wm. M. Van Dyke, Clerk. Bicknell, Gibson & Trask, Los Angeles, Cal., Solicitors for Defendant.

In the Circuit Court of the United States, for the Southern District of California, in the Ninth Circuit.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant.
No. 916.

Answer of San Joaquin Electric Company to Bill in Intervention of A. Y. Chick et al.

The answer of the defendant, San Joaquin Electric Company, to the bill of intervention filed herein on behalf of Alfred Young Chick and William Flanders Lewin.

This defendant, saving and reserving unto itself all and all manner of benefit and advantage which may be had or taken in the way of exception or otherwise to the many errors and insufficiencies in said bill of intervention contained, for answer thereto, or such part thereof as this defendant is advised it is material or necessary for it to make answer unto, answering says:

This defendant is not informed save by said bill of intervention whether or not the intervenors therein named are citizens and residents of the Kingdom of Great Britain, and can therefore neither admit nor deny the same.

Said defendant admits that the complainant is a corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business in the city of New York, and is a citizen and resident of said State, and that the defendant San Joaquin Electric Company, is a corporation of California, having its principal office and place of business at Fresno, in said State, and that John J. Seymour was at the time of the commencement of the above-entitled action and still is a citizen and resident of the State of California, and of the Southern District thereof.

This defendant denies that the default which occurred on the first day of January and July, 1899, in the payment of the semi-annual installment of interest upon the bonds secured by the mortgage or deed of trust sought to be foreclosed in this action, was the result of collusion between this defendant and any of its officers in charge of its business and the holders or owners of certain, or any, of the bonds of said defendant as alleged in said bill of intervention or that said or any default was brought about or this action was instituted for the purpose of bringing about any unnecessary reorganization by the company defendant to the detriment of the intervenors or any one of them in said bill, or of any of the bondholders of said defendant Electric Company not parties to said alleged collusion or scheme of re-organization.

And this defendant further denies that it was at the time said installments of interest fell due, able to pay

the same out of the earnings or funds of said company.

This defendant admits that John J. Seymour was by this Court appointed receiver of the property of this defendant covered by the mortgage or deed of trust sought to be foreclosed herein upon the application of the complainant, and is now acting as such receiver, and as such receiver is in possession of the property of this defendant Electric Company described and set forth in the bill of complaint in this suit.

This defendant also admits that John S. Eastwood is now employed by said Seymour as receiver and does perform such duties as are required of him from time to time by said receiver.

This defendant is not advised, save by said bill of intervention, and therefore can neither admit nor deny that the intervenors are the holders of seventy-eight or of any number of the bonds of this defendant Electric Company, or as to the amount of interest which fell due upon said bonds or any bonds held or claimed to be held by said intervenors, but this defendant admits that it made default in the payment of interest upon all of the bonds secured by the mortgage or deed of trust sought to be foreclosed herein as hereinbefore alleged, upon the first days of January and July, 1899.

This defendant denies that in the month of January, 1899, it had or possessed ample or any means, income, or resources to meet all of its just debts or liabilities, due or to become due, including the accrued or accruing interest on all or any of its said bonds, or that any of its officers or directors, including John J. Seymour and

John S. Eastwood, or either of them, conspired, together for the purpose of diverting or did unlawfully, fraudulently, or otherwise, divert any of its funds to any other purpose or purposely or intentionally avoided paying the interest on said bonds for the fraudulent or any unlawful purpose of enabling any of the bondholders of said company to bring or maintain a suit to foreclose the mortgage or deed of trust securing the bonds of this company or to carry out a scheme entered into by any bondholders and any of the officers of this company to reorganize this company to the detriment or injury of the company or any of the bondholders thereof, or that any of the officers of this company and any of the bondholders unlawfully or fraudulently, or in any manner, conspired together to induce the complainant, the Mercantile Trust Company, as trustee, or any of its officers, to foreclose the said mortgage or trust deed by suit against this company with the object or purpose of carrying out any scheme for the reorganization of said company in the interest of any bondholders and any of the officers of this company; or in pursuance of any unlawful or fraudulent scheme whatever, any of the officers of this company, having laid any foundation whatever, or being sufficient in numbers to authorize them so to do, requested or caused the trustee to be requested by anyone to bring suit to foreclose said mortgage or sell any of the property of the defendant company secured therein, not for the purpose of enforcing the collection of the amount due from the defendant company to its bondholders, but for the sole or any

purpose of bringing about any reorganization of said company in the interest of any of the bondholders or with the view or for the purpose of destroying the value of any of the bonds alleged to be held by these intervenors, or others similarly situated, it being fraudulently, or otherwise, agreed between any bondholders and said John J. Seymour, President of this defendant company, and John S. Eastwood, or either of them, that if said officers of said company would facilitate the foreclosure of said mortgage, the said officers should have or receive $100,000 of the stock of the corporation to be organized as a part of any scheme of re-organization; that said or any officers in consideration of any promise of stock of any new corporation so to be organized, did facilitate the foreclosure of said mortgage by fraudulently, purposely or intentionally allowing the interest upon the said bonds to become or continue delinquent for any period of time whereby the right of said trustee to foreclose the same became or was perfect in any manner, or that it was agreed or understood as a part of any scheme of foreclosure or reorganization that the said John J. Seymour, president of said company should be, or that he was, in pursuance of any such agreement, appointed receiver in the suit to foreclose said mortgage upon the request of any of said bondholders or that said president and the engineer of this defendant corporation are, or either of them is, now, or have been acting in collusion with any bondholders to bring about the foreclosure or sale of the property of said defendant corporation for the benefit of any bond-

holders or have inaugurated or are carrying out any scheme of reorganization, or for the purpose or with the object of destroying the value of any security held by these intervenors, or other bondholders similarly situated.

And the defendant further denies that the foreclosure proceedings in this action were conceived, commenced or are being prosecuted in furtherance of any alleged scheme for the reorganization of said defendant corporation or that any such scheme was contrived by or between the said bondholders, or that this action was begun at their suggestion, instigation or request in pursuance of any such scheme and any of the officers or directors of said defendant corporation, or that it was contrived or agreed by and between any persons that this defendant company should default in payment of interest upon its bonds or that the said trustee should thereupon elect or declare the entire principal and interest of said bonds immediately due or payable or thereupon proceed to foreclose said mortgage.

This defendant further denies that in pursuance of said, or any, conspiracy, this defendant failed or refused to pay the interest on its said bonded indebtedness as it became due though possessed of any means or resources so to do, or permitted or connived at, or still permits or connives at, said proceeding or that said scheme or proposed plan of reorganization of the company was as set forth by a purported copy in said bill in intervention.

On the contrary, this defendant alleges that neither it, nor any one of its officers, ever had knowledge or notice of any such proposed plan of reorganization until on or about the first day of July, 1899, and after the default in the two semi-annual installments of interest had been made by this defendant company. After this company had been unable to meet and pay its liabilities and the semi-annual installment of interest due January 1st, 1899, there was, as defendant is informed and believes and therefore alleges, a meeting of the respective bondholders to discuss the situation, at which meeting the intervenors were represented, at which said meeting a plan of reorganization was submitted on the lines stated in said purported copy. That this defendant, nor any one of its officers, did not know of said meeting, or of any proposed plan of reorganization until long after the holding of said meeting. That in the month of July, 1899, John J. Seymour, president of the defendant corporation, went to New York at the request of different bondholders, at which said time the proposed plan of reorganization as shown by said purported copy, was submitted to the different bondholders, but said plan was simply a proposal and was never accepted or acted upon, and that it was understood and agreed by the parties who submitted the same that it was not to be accepted or acted upon unless all of the bondholders and the parties interested agreed thereto. That no such agreement having been had, said proposal was never acted upon or followed. That said proposal was submitted solely and only in the interest of all the

different bondholders, so that said company could be reorganized, and to facilitate a reorganization with the least expense and trouble. But defendant alleges upon information and belief that said proposition was not drawn or prepared or submitted to the different bondholders interested in the company until long after the default had been had by this defendant corporation in the payment of its semi-annual installment of interest, and after demand had been made upon the plaintiff herein to institute this action by reason of said default. That said proposal was made in entire good faith, believing the same to be in the best interests of the bondholders and all parties interested, and was subject to any change or modification to be suggested and approved by the parties to whom the proposal was made. And said defendant further alleges upon information and belief that the intervenors herein had full knowledge and notice of the said proposal, and the reasons why the same was made and participated in the meeting of the bondholders, and agreed thereto.

This defendant further denies that The Mercantile Trust Company had any notice or knowledge at the time it brought this action that the purpose of such foreclosure was to bring about any reorganization of said defendant company, or not for the enforcement of the collection of the amount due upon said bonds, or that any plan for the re-organization of said defendant corporation was conceived or inaugurated, or the plan thereof determined upon before default had been made in the payment of interest upon said bonds, or any of

them, or that if said plan or scheme of reorganization had not been determined upon any suit would not have been requested to have been brought by said bondholders, or that the same would not have been necessary or would not have been brought by the said Mercantile Trust Company, or that the officers of said corporation defendant would not have allowed interest upon said bonds to become delinquent or remain unpaid for such time as to entitle the trustee of said bondholders to elect to declare the principal and interest of said bonds to be due or payable.

This defendant denies that it is, or was at the time of said default in the payment of interest occurred, solvent or possessed of any property, income or resources to meet all of its just debts or liabilities, including the interest on said bonds, or that said interest might have been, or would have been, paid out of the ordinary revenues or receipts of said company, but for the fraudulent, or any, conspiracy set forth in said bill of intervention, or the purpose or intention of any of the officers of said defendant company, or any bondholder to bring about the foreclosure of said mortgage or the re-organization of said company for the benefit of any bondholders or to the detriment of any bondholders not entering into said or any scheme.

This defendant further denies that the bringing of this suit was unnecessary or has involved the bondholders of the company in any unnecessary cost or expense, or reduced the value of the security of the bondholders, or has been in any manner detrimental to the interest of the intervenors or any of the bondholders of the company; on

the contrary this defendant alleges that said suit was brought by said complainant, as trustee, in good faith and for the necessary and proper protection of the interests of the holders of the said bonds, and so far as said defendant is informed, and verily believes, that the request made to said complainant to institute said suit was made by the holders of the bonds making the same, in good faith, and for no other purpose than the protection of the interests of the holders of all the bonds secured by said mortgage or deed of trust, or intended so to be.

Without this that any other matter or thing in said bill of intervention contained and not herein sufficiently admitted, answered, traversed or denied, is true to the knowledge of said defendant; and now having fully answered, this defendant prays that the said bill of intervention may be dismissed, and that said defendant may have and recover of said intervenors its costs in this behalf most wrongfully incurred and for such other and further relief as to the court may seem meet.

SAN JOAQUIN ELECTRIC COMPANY,
J. M. COLLIER,
Secretary.

BICKNELL, GIBSON & TRASK,
Solicitors for said Defendant.

United States of America,
County of Fresno,
Southern District of California. } ss.

J. M. Collier, being first duly sworn, says that he is an officer, to wit, the secretary of the San Joaquin Electric Company, the defendant named in the foregoing answer; that he has read the said answer and knows the contents thereof; that the allegations therein contained so far as they relate to his own acts are true, and, so far as they relate to the acts of others, he believes them to be true.

J. M. COLLIER,
Secr.

Subscribed and sworn to before me this 12th day of June, 1900.

[Seal] A. HARVEY,
Notary Public in and for the County of Fresno, State of California

[Endorsed]: Original. No. 916. U. S. Circuit Court, Ninth Circuit, Southern District of California. Mercantile Trust Co., as Trustee, Complainant, vs. San Joaquin Electric Co., Defendant. Answer to Bill of Intervention. Received copy of the within answer this 13th day of June, 1900. Works & Lee, Solicitors for Intervenors. Filed June 13, 1900. Wm. M. Van Dyke, Clerk. Bicknell, Gibson & Trask, Los Angeles, Cal., Solicitors for Defendant.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant.
ALFRED YOUNG CHICK et al.,
Intervenors.

Replication to Answer of Mercantile Trust Company to Bill in Intervention.

The replication of Alfred Young Chick and William Flanders Lewin, intervenors, to the answer of the complainant, The Mercantile Trust Company, to their bill in intervention herein.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereto say that they will aver, maintain and prove their said bill in intervention to be true, certain and sufficient in law to be answered unto, and that the said answers of the said complainant are uncertain, untrue and insufficient to be replied to by these intervenors;

without this, that any other matter or thing whatsoever in said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, refused or avoided, traversed or denied, are true; all of which matters and things these repliants are and will be ready to aver, maintain and prove as this Honorable Court shall direct, maintain and prove as this Honorable Court shall direct, and humbly pray as and by their said bill in intervention they have already prayed.

GEORGE E. CHURCH,
L. A. GROFF,
WORKS & LEE,
Solicitors for Intervenors.

[Endorsed]: Original. No. 916. U. S. Circuit Court Ninth Circuit, Southern District of California. Mercantile Trust Company, as Trustee, vs. San Joaquin Electric Company. Replication of Intervenors. Received copy of the within June 16, 1900. Chas Monroe. By D. H. McD. Filed June 16, 1900. Wm. M. Van Dyke, Clerk. Geo. E. Church, L. A. Groff and Works & Lee, Rooms 420 to 425 Henne Building, Los Angeles, Cal., Solicitors for Intervenors.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

MERCANTILE TRUST COMPANY, as TRUSTEE,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant,
ALFRED YOUNG CHICK et al.,
Intervenors.

Replication to Answer of San Joaquin Electric Company to Bill in Intervention.

The replication of Alfred Young Chick and William Flanders Lewin, intervenors, to the answer of the defendant, the San Joaquin Electric Company, to their bill in intervention herein.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereto say that they will aver, maintain and prove their said bill in intervention to be true, certain and sufficient in law to be answered unto, and that the said answers of the said defendant are uncertain, untrue and insufficient to be replied to by these intervenors; without this, that any other matter or thing whatsoever in said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, refused or avoided, traversed or denied, are

true; all of which matters and things these repliants are and will be ready to aver, maintain and prove as this Honorable Court shall direct, and humbly pray as and by their said bill in intervention they have already prayed.

GEORGE E. CHURCH,
L. A. GROFF,
WORKS & LEE,
Solicitors for Intervenors.

[Endorsed]: Original. No. 916. U. S. Circuit Court, Ninth Circuit, Southern District of California. Mercantile Trust Company, as Trustee, vs. San Joaquin Electric Company. Replication of Intervenors. Received Copy of the within June 16, 1900, Chas. Monroe. By D. H. McD. Filed June 16, 1900. Wm. M. Van Dyke, Clerk. Geo. E. Church, L. A. Groff, and Works & Lee, Rooms 420 to 425 Henne Building, Los Angeles, Cal., Solicitors for Intervenors.

In the Circuit Court of the United States, for the Southern District of California, in the Ninth Circuit.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant.
No. 916.

Answer of John J. Seymour and John S. Eastwood to Bill in Intervention.

The answer of John J. Seymour, the receiver appointed by the Court herein, and John S. Eastwood, to the bill

of intervention filed herein on behalf of Alfred Young Chick and William Flanders Lewin.

These defendants saving and reserving unto themselves all and all manner of benefit and advantage which may be had or taken in the way of exception or otherwise to the many errors and insufficiencies in said bill of intervention contained, for answer thereto, or such part thereof as these defendants are advised it is material or necessary for them to make answer unto, answering say:

These defendants are not informed save by said bill of intervention whether or not the intervenors therein named are citizens and residents of the Kingdom of Great Britain, and can therefore neither admit nor deny the same.

Defendants admit that the complainant is a corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business in the city of New York, and is a citizen and resident of said State, and that the defendant, San Joaquin Electric Company, is a corporation of California, having its principal office and place of business at Fresno in said State, and that John J. Seymour was at the time of the commencement of the above-entitled action and still is a citizen and resident of the State of California and of the Southern District thereof.

These defendants deny that the default which occurred on the first day of January, and July, 1899, in the payment of the semi-annual installment of interest upon the bonds secured by the mortgage or deed of trust sought to be foreclosed in this action, was the result of collu-

sion between the said defendant and any of its officers in charge of its business and the holders or owners of certain or any of the bonds of said defendant as alleged in said bill of intervention or that said or any default was brought about or this action was instituted for the purpose of bringing about any unnecessary reorganization by the company defendant to the detriment of the intervenors or any one of them in said bill, or of any of the bondholders of said defendant Electric Company not parties to said alleged collusion or scheme of reorganization.

And these defendants further deny, that the said defendant company was at the time said installment of interest fell due able to pay the same out of the earnings or funds of said company.

These defendants admit that John J. Seymour was by this Court appointed receiver of the property of said defendant covered by the mortgage or deed of trust sought to be foreclosed herein upon the application of the complainant, and is now acting as such receiver, and as such receiver is in possession of the property of the defendant Electric Company described and set forth in the bill of complaint in this suit.

These defendants also admit that John S. Eastwood is now employed by said Seymour as receiver and does perform such duties as are required of him from time to time by said receiver.

There defendants are not, nor is either one of them, advised save by said bill of intervention and therefore can neither admit nor deny that the intervenors are the holders of seventy-eight or of any number of the bonds

of the defendant Electric Company, or as to the amount of interest which fell due upon said bonds or any bonds held or claimed to be held by said intervenors, but these defendants admit that the defendant Electric Company made default in the payment of interest upon all of the bonds secured by the mortgage or deed of trust sought to be foreclosed herein as hereinbefore alleged, upon the first days of January and July, 1899.

Defendants deny that in the month of January, 1899, the defendant, San Joaquin Electric Company had or possessed ample or any means, income, or resources to meet all of its just debts or liabilities, due or to become due, including the accrued or accruing interest on all or any of its said bonds, or that any of its officers or directors, including these defendants, or either of them, conspired together for the purpose of diverting or did unlawfully, fraudulently or otherwise, divert any of its funds to any other purpose, or purposely or intentionally avoid paying the interest on said bonds for the fraudulent or any unlawful purpose of enabling any of the bondholders of said company to bring or maintain a suit to foreclose the mortgage or deed of trust securing the bonds of said company or to carry out a scheme entered into by any bondholders, and any of the officers of said company to reorganize said company to the detriment or injury of the company or any of the bondholders thereof, or that any of the officers of said company and any of the bondholders unlawfully or fraudulently, or in any manner, conspired together to induce the complainant, The Mercantile Trust Company, as trustee, or

any of its officers to foreclose the said mortgage or trust deed by suit against the company, with the object or purpose of carrying out any scheme for the reorganization of said company in the interest of any bondholders and any of the officers of said company, or in pursuance of any unlawful or fraudulent scheme whatever any of the officers of said company, having laid any foundation whatever, or being sufficient in numbers to authorize them so to do, requested or caused the trustee to be requested by anyone to bring suit to foreclose said mortgage or sell any of the property of the defendant company secured therein, not for the purpose of enforcing the collection of the amount due from the defendant company to its bondholders, but for the sole or any purpose of bringing about any reorganization of said company in the interest of any of the bondholders or with the view, or for the purpose of destroying the value of any of the bonds alleged to be held by these intervenors, or others similarly situated, it being fraudulently, or otherwise, agreed between any bondholders and said John J. Seymour, president of said defendant company, and John S. Eastwood, or either of them, that if said officers of said company would facilitate the foreclosure of said mortgage, the said officers should have or receive $100,000 of the stock of the corporation to be organized as a part of any scheme of reorganization; that said or any officers in consideration of any promise of stock of any new corporation so to be organized, did facilitate the foreclosure of said mortgage by fraudulently, purposely or intentionally allowing the interest

upon the said bonds to become or continue delinquent for any period of time whereby the right of said trustee to foreclose the same, became or was perfect in any manner, or that it was agreed or understood as a part of any scheme of foreclosure or reorganization that the said John J. Seymour, president of said company, should be, or that he was, in pursuance of any such agreement, appointed receiver in the suit to foreclose said mortgage upon the request of any of said bondholders or that said president and the engineer of said defendant corporation are, or either of them is, now or have been acting in collusion with any bondholders to bring about the foreclosure or sale of the property of said defendant corporation for the benefit of any bondholders, and have inaugurated or are carrying out any scheme of reorganization, or for the purpose or with the object of destroying the value of any security held by these intervenors, or other bondholders similarly situated.

And the defendants further deny that the foreclosure proceedings in this action were conceived, commenced or are being prosecuted in furtherance of any alleged scheme for the reorganization of said defendant corporation or that any such scheme was contrived by or between the said bondholders, or that this action was begun at their suggestion, instigation or request in pursuance of any such scheme and any of the officers or directors of said defendant corporation, or that it was contrived or agreed by and between any persons that said defendant company should default in payment of

interest upon its bonds or that the said trustee should thereupon elect or declare the entire principal and interest of said bonds immediately due or payable or thereupon proceed to foreclose said mortgage.

These defendants further deny that in the pursuance of said, or any, conspiracy, the defendant company failed or refused to pay the interest on its said bonded indebtedness as it became due though possessed of any means or resources so to do, or permitted or connived at, or still permits or connives at said proceeding, or that said scheme or proposed plan of reorganization of the company was as set forth by a purported copy in said bill in intervention.

On the contrary, these defendants allege that neither one of them ever had knowledge or notice of any such proposed plan of reorganization until on or about the first day of July, 1899, and after the default in the two semi-annual installments of interest had been made by the defendant company. After said company had been unable to meet and pay its liabilities and the semi-annual installment of interest due January 1st, 1899, there was, as defendants are informed and believe and therefore allege, a meeting of the respective bondholders to discuss the situation, at which meeting the intervenors were represented, at which said meeting a plan of reorganization was submitted on the lines stated in said purported copy. That these defendants did not know of said meeting, or of any proposed plan of reorganization until long after the holding of said meeting. That in the month of July, 1899, the defendant, John J. Sey-

mour, went to New York at the request of different bondholders, at which said time, the proposed plan of reorganization, as shown by said purported copy, was submitted to the different bondholders, but said plan was simply a proposal and was never accepted or acted upon, and that it was understood and agreed by the parties who submitted the same that it was not to be accepted or acted upon unless all of the bondholders and the parties interested agreed thereto. That no such agreement having been had, said proposal was never acted upon or followed. That said proposal was submitted solely and only in the interest of all the different bondholders, so that said company could be reorganized, and to facilitate a reorganization with the least expense and trouble. But defendants allege upon their information and belief that said proposition was not drawn or prepared or submitted to the different bondholders interested in the company until long after the default had been made by the defendant corporation in the payment of its semi-annual installment of interest, and after demand had been made upon the plaintiff herein to institute this action by reason of said default. That said proposal was made in entire good faith, believing the same to be in the best interests of the bondholders and all parties interested, and was subject to any change or modification to be suggested and approved by the parties to whom the proposal was made. And said defendants further allege, upon their information and belief that the intervenors herein had full knowledge and notice of the said proposal and the reasons why the

same was made and participated in the meeting of the bondholders and agreed thereto.

These defendants further deny that the Mercantile Trust Company had any notice or knowledge at the time it brought this action that the purpose of such foreclosure was to bring about any reorganization of said defendant company, or not for the enforcement of the collection of the amount due upon said bonds, or that any plan for the reorganization of said defendant corporation was conceived or inaugurated or the plan thereof determined upon before default had been made in the payment of interest upon said bonds, or any of them, or that if said plan or scheme of reorganization had not been determined upon any suit would not have been requested to have been brought by said bondholders, or that the same would not have been necessary or would not have been brought by the said Mercantile Trust Company, or that the officers of said corporation defendant would not have allowed interest upon said bonds to become delinquent or remain unpaid for such time as to entitle the trustee of said bondholders to elect to declare the principal and interest of said bonds to be due or payable.

The defendants deny that the defendant, the San Joaquin Electric Company is or was at the time of said default in the payment of interest occurred, solvent or possessed of any property, income, or resources to meet all of its just debts or liabilities, including the interest on said bonds, or that said interest might have been, or would have been, paid out of the ordinary revenues

or receipts of said company, but for the fraudulent, or any, conspiracy set forth in said bill of intervention, or the purpose or intention of any of the officers of said defendant company, or any bondholder to bring about the foreclosure of said mortgage or the reorganization of said company for the benefit of any bondholders or to the detriment of any bondholders not entering into said or any scheme.

These defendants further deny that the bringing of this suit was unnecessary or has involved the bondholders of the company in any unnecessary cost or expense, or reduced the value of the security of the bondholders, or has been in any manner detrimental to the interest of the intervenors or any of the bondholders of the company; on the contrary, these defendants allege that said suit was brought by said complainant as trustee in good faith, and for the necessary and proper protection of the interests of the holders of the said bonds, and so far as said defendants are informed and verily believe, that the request made to said complainant to institute said suit was made by the holders of the bonds making the same in good faith, and for no other purpose than for the protection of the interests of the holders of all the bonds secured by said mortgage or deed of trust, or intended so to be.

Without this that any other matter or thing in said bill of intervention contained and not herein sufficiently admitted, answered, traversed or denied, is true to the knowledge of said defendants; and now, having fully

answered said defendants, pray that the said bill of intervention may be dismissed, and that said defendants may have and recover of said intervenors their costs in this behalf most wrongfully incurred, and for such other and further relief as to the Court may seem meet.

JOHN J. SEYMOUR,
JOHN S. EASTWOOD,
L. L. CORY,
Solicitors for Defendants.

United States of America,
County of Fresno,
Southern District of California. } ss.

John J. Seymour, being first duly sworn, says that he is one of the defendants named in the foregoing answer; that he has read the said answer and knows the contents thereof; that the allegations therein contained, so far as they relate to his own acts, are true, and, so far as they relate to the acts of others, he believes them to be true.

JOHN J. SEYMOUR.

Subscribed and sworn to before me this 12th day of June, 1900.

[Seal] A. HARVEY,
Notary Public in and for the County of Fresno, State of California.

[Endorsed]: No. 916. In the Circuit Court, 9th Circuit, State of California. Mercantile Trust Company, Plaintiff, vs. San Joaquin Electric Company et al., De-

fendants. Answer of John J. Seymour et al. to Bill of Intervention. Received copy of the within answer is admitted by copy this 18th day of June, 1900. Works & Lee, Attorneys for Intervenors. Filed June 18, 1900. Wm. M. Van Dyke, Clerk. L. L. Cory, First National Bank Building, Fresno, Cal., Attorney for ————.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant,
ALFRED YOUNG CHICK et el.,
Intervenors.

Replication to Answer of John J. Seymour and John S. Eastwood.

The replication of Alfred Young Chick and William Flanders Lewin, intervenors, to the answer of John J. Seymour, the receiver appointed by the Court herein, and John S. Eastwood, to their bill in intervention herein.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereto say that they will aver,

maintain and prove their said bill in intervention to be true, certain and sufficient in law to be answered unto, and that the said answers of the said defendants are uncertain, untrue and insufficient to be replied to by these intervenors; without this, that any other matter or thing whatsoever in said answer contained, material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied unto, refused or avoided, traversed or denied, are true; all of which matters and things these repliants are and will be ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray as and by their said bill in intervention they have always prayed.

GEORGE E. CHURCH,
L. A. GROFF,
WORKS & LEE,
Solicitors for Intervenors.

[Endorsed]: Original. No. 916. U. S. Circuit Court, Ninth Circuit, Southern District of California. Mercantile Trust Co., as Trustee, vs. San Joaquin Electric Co. Replication of Intervenors. Received copy of the within June 26, 1900. Chas. Monroe, Attorney for Plaintiff. Filed June 26, 1900. Wm. M. Van Dyke, Clerk. Works & Lee, Rooms 420 to 425 Henne Building, Los Angeles, Cal., Solicitors for Intervenors.

At a stated term, to wit, the July term, A. D. 1900, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom in the city of Los Angeles, on Tuesday, the fourth day of September, in the year of our Lord one thousand nine hundred. Present: The Honorable OLIN WELLBORN, District Judge.

MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant.
No. 916.

Order Allowing Motion to Strike Out from Bill in Intervention and Answer.

This cause having heretofore been submitted to the Court for its consideration and decision on the motion of complainant to strike out from the paper filed by the intervenors herein, as a bill in intervention, so much thereof as purports to be or is set up therein, as an answer to the original bill herein, and particularly to strike out from and including line 9, on page 2, to and including the last line at the bottom of page 5, and the Court having duly considered the same and being fully advised in

the premises, it is now, on this 4th day of September, 1900, being a day in the July Term, A. D. 1900, of said court, ordered that said motion be, and the same hereby is, allowed.

NOTE.

The portion of the bill in intervention struck out by the foregoing order described in said order as "from and including line 9 on page 2, to and including the last line at the bottom of page 5" of said bill in intervention is as follows:

Your intervenors further show to your Honors as follows:

They admit that on or about the 1st day of July, 1895, the defendant made, executed and issued its certain sixteen hundred (1600) bonds, each for the principal sum of five hundred dollars ($500.00), and for the principal sum in the aggregate thereof of eight hundred thousand dollars ($800,000.00), each bearing date the 1st day of July, 1895, wherein and in each of said bonds the said defendant, for value received, promised to pay to the bearer the sum of five hundred dollars ($500,00), in gold coin of the United States of America, of the then standard of weight and fineness, on the 1st day of July, 1915, at the office of the complainant, in the city of New York, together with interest thereon at the rate of six (6) per cent per annum, payable semi-annually, in like gold coin, on the 1st days of January and July in each year, on presentation and surrender of the interest coupons attached to said bonds, as they severally should become due, said interest also being payable at the office of said complainant.

They admit that in order to secure the payment of the principal and interest of said bonds, the said defendant, on or about the 1st day of July, 1895, made, executed and delivered to the complainant, as trustee, a certain mortgage or deed of trust, dated on that day, wherein and whereby it granted, bargained, sold, assigned, set over, released, aliened, conveyed and confirmed unto said complainant and its assigns and successors, in trust, for the purposes in said mortgage set forth, the property described in the third paragraph of the bill of complaint herein, to have and to hold all such property and all other possession, franchises and claims acquired or to be acquired, and all other premises in said mortgage expressed to be conveyed and assigned unto the use of said complainant and its successors in interest, according to the manner, terms and effect in said mortgage expressed of and concerning the same, for the benefit, protection and security of the persons holding the said bonds, or any of them; that said mortgage or deed of trust was duly recorded in the proper offices in the counties in which the property described therein and thereby conveyed, or intended so to be, was situated, a copy of which mortgage is annexed to and made a part of the bill of complaint herein.

They admit that of the bonds provided to be issued under and secured by said mortgage or deed of trust, or intended so to be, eleven hundred ten (1110) bonds, numbered from one (1) to eleven hundred ten (1110), inclusive, for the principal sum in the agregate of five hun dred fifty thousand dollars ($550,000.00), were duly executed and issued by the said defendant, and were certi-

fied by said complainant as trustee under said mortgage or deed of trust, and that the same are now outstanding in the hands of bona fide holders thereof for value.

They admit that in and by the said mortgage or deed of trust it was, among other things, provided that in case the said defendant or its successors should make default in the payment of any interest on any of said bonds, according to the tenor thereof, the payment thereof having been demanded according to the terms thereof, or should make a breach of any of the covenants or agreements in said mortgage contained by it to be done or performed, and such default or breach should continue for the period of six (6) months, that then and thereupon the principal of all of said bonds then outstanding and unpaid might, at the election of the trustee, or at the request of one-tenth (1-10) of the amount of bonds then outstanding and secured thereby, become immediately due and payable.

They admit that in and by said mortgage or deed of trust, it was further provided that if the defendant or its successors should make default in the payment of the principal or any part thereof, or any installment of interest, or any part thereof, and such default should continue for the space of six (6) months after maturity and demand therefor, it should be the duty of the trustee, upon request and indemnification in said mortgage, provided, to proceed in any proper court to foreclose said mortgage, and that the said trustee, the complainant herein, should be entitled to the appointment of a receiver, and specific performance of all the covenants therein con-

tained, and said trustee might, in case of default, apply to any court having competent jurisdiction, for instructions as to the matters not therein expressly provided for.

They admit that on or about the 1st day of January, 1899, there fell due a semi-annual installment of interest upon said bonds represented by the coupons attached thereto, amounting to the sum of sixteen thousand, six hundred fifty dollars ($16,650.00), which amount of interest the defendant refused and neglected to pay; but deny that payment thereof was duly or at all demanded, and that a like default occurred on the 1st day of July, 1899; but your intervenors allege that said default was the result of collusion between the said defendant and its officers in charge of its business and the holders and owners of certain of the bonds of said defendant, and the same owners and holders of bonds who have caused this suit to be instituted and for the purpose of bringing about an unnecessary reorganization of said company and its affairs, to the detriment of your intervenors and other of the bondholders of said defendant not parties to said collusion or scheme of reorganization; and they further aver that the said defendant was fully able to pay the said installments of interest, as they fell due, out of the earnings and funds of said company, and that no proper demand for the payment of said interest was ever made.

They admit that the said default continued for a period of more than six (6) months, but deny that the complainant was requested by the holders of more than a majority of the bonds outstanding and secured by said mortgage or deed of trust, or intended so to be, under the power

and authority given to it by said mortgage or deed of trust, to declare, or that the complainant elected or declared that the principal of all the bonds then outstanding and unpaid should become immediately due and payable, or that it served notice of such election upon the defendant.

They deny that the defendant, San Joaquin Electric Company, is insolvent, or wholly or at all unable to pay its present or presently accruing indebtedness or liabilities, or the interest on said bonds now due, or that the property covered by the said mortgage or deed of trust, or intended so to be, is slender or insufficient security for the payment of said indebtedness.

They deny that in addition to the amount represented by the said bonds and coupons, the said defendant is indebted to sundry or divers persons in large sums, which debts, or any of them, have been incurred in the operation of the business of the said defendant, or which debts the said defendant is wholly or at all unable to pay.

They deny that by reason of the insolvency of the said defendant, or for any other reason, it is necessary for the proper protection of the holders of the bonds and coupons secured by the mortgage or deed of trust given to the complainant, as aforesaid, that a receiver or receivers of the property of the said defendant, San Joaquin Electric Company, should be appointed, with the powers given to such receiver or receivers in like cases under the course and practice of this court, or at all.

They admit that the matter in controversy herein exceeds five thousand dollars ($5,000.00), inclusive of interest and costs.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

MERCANTILE TRUST COMPANY,
Complainant,

vs.

SAN JOAQUIN ELECTRIC COMPANY,
Defendant,

A. Y. CHICK and W. F. LEWIN,
Intervenors.

Stipulation as to Taking Testimony of Charles H. Coffin.

It is hereby stipulated that the testimony of Charles H. Coffin may be taken in the above-entitled cause on behalf of the intervenors, A. Y. Chick and W. F. Lewin, at the law office of Ira W. and C. C. Buell, 510 Chicago Title and Trust Building, 100 Washington street, Chicago, Illinois, on the 16th day of October, 1900, before Oliver T. Cody, a notary public in and for the county of Cook, State of Illinois; that said testimony be taken orally, and in shorthand, by a competent stenographer, and that the same be transcribed into longhand in typewriting, and so transcribed, duly certified by such stenographer to be correct; and that as so taken, and transcribed, the testimony be transmitted to the clerk of the United States Circuit

Court in and for the Ninth Circuit, Southern District of California, at Los Angeles, California.

Los Angeles, Cal., September 29, 1900.

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for Complainant.

BICKNELL, GIBSON & TRASK,
Solicitors for Defendant.

GEORGE E. CHURCH,
L. A. GROFF,
WORKS & LEE,
Solicitors for Intervenors.

[Endorsed]: Original No. 916. U. S. Circuit Court, Ninth Circuit, Southern District of California. Mercantile Trust Co., vs. San Joaquin Electric Co. Stipulation. Works & Lee, Rooms 420 to 425, Henne Building, Los Angeles, Cal., Solicitors for Intervenors.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

MERCANTILE TRUST COMPANY,
Complainant,

vs.

SAN JOAQUIN ELECTRIC COMPANY,
Defendant,

A. Y. CHICK and W. F. LEWIN,
Intervenors.

Deposition of Charles H. Coffin.

Deposition of Charles H. Coffin, taken before Oliver T. Cody, a notary public, in and for the county of Cook, in the State of Illinois, on behalf of the intervenors, A. Y. Chick, and W. F. Lewin, in the above-entitled cause on the 16th day of October, A. D. 1900, at the hour of ten o'clock A. M., said deposition being taken in pursuance of the stipulation hereto attached, entered into between counsel for the respective parties in the above-entitled cause, dated September 29, A. D. 1900.

Present: HENRY C. WOOD, Representing the Complainant.

CHARLES C. BUELL, Representing the Intervenors.

CHARLES H. COFFIN, produced as a witness on behalf of the intervenors, having been first duly affirmed, deposes and says as follows:

Direct Examination.

(By Mr. BUELL.)

Q. What is your name? A. Charles H. Coffin.

Q. Where do you reside?

A. 380 Ontario street, Chicago.

Q. What is your business?

A. Broker in investment securities.

Q. Are you familiar with the affairs of the San Joaquin Electric Company, and, if so, for how long a time have you been familiar with their affairs?

A. From its organization down to August, 1899.

Q. Are you a stockholder in the corporation?

A. Yes, sir, I am.

Q. When was the San Joaquin Electric Company organized?

A. I think in 1895—April 2, 1895.

Q. Are you familiar with the affairs of the Fresno Water Company? A. Yes, sir.

Q. During what time have you been familiar with their affairs?

A. From about 1888, down to August, 1899.

Q. Are you acquainted with Mr. Charles F. Street of New York? A. Yes, sir.

Q. How long have you been acquainted with him?

A. Since he was born.

Q. How long is that?

A. I should say about forty years.

(Deposition of Charles H. Coffin.)

Q. What is his business, if you know, and what was his business in the years 1898, 1899, and 1900?

A. He was a banker, and dealer in investment securities, and principally occupied in representing English clients in their reorganization of American companies.

Q. Do you know of the American Securities Agency, Limited, of London, England? A. Yes, sir.

Q. What connection, if any, has Mr. Street with that agency, if you know?

A. He is their American agent.

Q. What was the condition of the San Joaquin Electric Company on January 1, 1899?

(Objected to by counsel for complainant as incompetent, irrelevant and immaterial.)

(It is stipulated and agreed by and between counsel that all questions which are objected to upon the grounds of incompetency, irrelevancy, and immateriality, and also for other reasons as may be stated, may be answered subject to the objection.)

A. My answer would be that monthly statements were submitted to me of the condition of the company from the time of its organization up to August, 1899.

Q. Did you ever receive any statement or statements of the condition of the San Joaquin Electric Company on January 1, 1899?

A. Yes, sir; I received such a statement some time in the month of January, 1899.

Q. Look at this paper now shown you, and state whether or not that is the statement which was furnished

(Deposition of Charles H. Coffin.)

to you by the officers of the company as to the condition of the company on January 1, 1899?

A. This statement is dated February 14, 1899, and was submitted to me, or was sent to me, a statement of which this is a copy. There was a previous statement early in January. When I got that previous statement I wrote back for this one, which gives the matters in detail.

Q. This is signed by whom?

A. The San Joaquin Electric Company, by John J. Seymour, president, and J. M. Collier, secretary.

Q. They were the president and secretary of the San Joaquin Electric Company at that time, were they?

A. Yes, sir. The statement is attested by the seal of the company.

Mr. BUELL.—We offer that statement in evidence.

(Objected to by counsel for complainant, as incompetent, irrelevant and immaterial.)

Statement offered in evidence marked "Exhibit No. 1," and is in words and figures following, to wit:

(Deposition of Charles H. Coffin.)

Exhibit No. 1.

Fresno, California, Feb. 14th, 1899.

STATEMENTS

of the

Fresno Water Co., and The San Joaquin Electric Co.

for the year ending Dec. 31st, 1898.

FRESNO WATER COMPANY.

Receipts:			
From consumers	$48,352.82		
Service connections ..	135.00		
Sundry collections ...	422.95	$48,913.77	
Operating Expenses:			
Power .. .	$6,000.00		
Fuel	4,836.90	10,836.90	
Salary		7,637.20	
Expense		3,054.66	
Taxes		4,024.99	
Interest		589.40	
Interest on bonds....	19,500.00	45,643.15	$ 3,270.62
Resources:			
San Joaquin Electric Company	$22,688,22		
Cash in bank.....	1,003.47	$23,691.69	
Liabilities:			
Fresno National Bank	5,883.80		
Crane Company	4,908.70		
Union Oil Co.....	880.66		
Westinghouse Electric Company	1,200.00	12,873.16	10,818.52

(Deposition of Charles H. Coffin.)

NOTES.

Since January 1st, 1899, $1,000 on Fresno National Bank note has been paid.

In the liabilities of the company there appears as entry of $4,908.70 owing to the Crane Company for a power pump. The secretary entered it on the company's books, but as the pump was rejected the entry has since been canceled. A satisfactory substitute has been found at an expense of less than $1,000.

SAN JOAQUIN ELECTRIC COMPANY.

Operating Expense:			
Expense, interest and taxes	$ 8,026.62		
Salary	14,787.60		
Carbons	1,118.19		
Bond interest	31,500.00	$55,432.41	
Receipts:			
Current collections	37,432.28		
Merchandise	673.62	38,105.90	17,326.51
Liabilities:			
Accounts unpaid	4,701.53		
Bills payable	16,150.00		
Water Company	22,688.22		
General Electric Co.	7,201.27	50,741.02	
Liabilities:			50,741.02

(Deposition of Charles H. Coffin.)

Resources:

Accounts due us.....	6,508.95	
Cash on hand.....	1,188.35	
Bonds on hand.....	30,000.00	37,697.30

Bonds held as collateral, by the following named creditors:

General Electric Co., 10 bonds, $5,000, $4,500.

W. Liddell, 13 bonds, $6,500, $4,500.

First National Bank, 16 bonds $8,000, $5,400.

Fresno National Bank, 21 bonds, $10,500, to secure $5,883.80 due from the Fresno Water Company.

NOTES.

Since January 1st, 1899, there has been paid on the Liddell note, $1,000; First National Bank note, $1,000.

ESTIMATE OF REVENUE

of

The Fresno Water Co. and The San Joaquin Electric Co.

for the year ending Dec. 31st, 1899.

FRESNO WATER COMPANY.

Collections from all sources for the year 1898..$48,914.00

Expenditures:

General expenses	$2,427	
Salaries	8,250	
Power and extra fuel.....	7,000	
Taxes	3,025	
Interest on bonds	19,500	$40,472.00

(Deposition of Charles H. Coffin.)

NOTES.

The yearly increase of revenue for the past three years has averaged $2,100. This in the face of a slight reduction of rates each year. As there will be no change of rates for the present year, it is fair to add at least this amount to the gross revenues.

The expenses of the water company were greatly increased by reason of the drought prevailing throughout California, which occasioned a partial shutdown of the San Joaquin Electric Company's plant, on which the water company was dependent for its power supply. The water company was forced to extra and unusual expenditures to keep up its supply. There is no reason to apprehend a recurrence of this mishap, hence the extra expenditures are partially omitted from our estimates for this year.

SAN JOAQUIN ELECTRIC COMPANY.

The actual monthly earnings from lights and small motors for the month of January, 1899 (taken register collections in February), $3,575.04. For 12 months	$42,900.48
Additional, contracted to begin March 1st, per month, $45.50. For 10 months	455.00
Increased rates of various consumers, to begin March 1, per month, $139.50. For 10 months	1,395.00
Sperry Flour Company	3,600.00
San Joaquin Ice Company	5,800.00
Hanford Extension	7,200.00
Total	$61,350.48

(Deposition of Charles H. Coffin.)

Expenditures:		
General expenses, taxes, etc.....	$ 4,981.00	
Salaries	14,880.00	
Carbons	1,000.00	
Bond interest	31,500.00	
Hanford Extension interest	3,000.00	
Hanford Extension construction.	4,200.00	$59,561.00
		$ 1,789.48

NOTE.

The partial shut-down of the plant, because of the drought, occasioned an almost chaotic condition of the company's affairs. The revenues were almost wholly cut off, while the expenses were increased, by reason of the attempt to make good our contracts to supply power and lights as far as it could possibly be done. For this reason an attempt to base any estimate for this year's business on that of last year would be altogether misleading and unfair to the company.

The custom lost by reason of our inability to supply demands has gradually returned, as the January earnings are about what they were at the beginning of the shut-down. For this reason the January earnings are taken as a basis for the year's business, together with the increase and additional consumers already contracted with.

We confidently expect an increase of earnings over the above showing for the year, for the following reasons:

1st. The contract for city lighting has been let to us at an increased figure over former years.

(Deposition of Charles H. Coffin.)

2d. There is a movement among street-car people to install an electric-car system, which bids fair to succeed in the near future.

3d. The San Joaquin Ice Company is adding a creamery to their already extensive plant, which will require additional power.

4th. The company has found that it can safely make a raise in the rates of many of its consumers and still retain their custom, and this policy is being gradually carried out.

5th. There is a gradual growth of the business, due to the growth of the city.

Hence, there is every reason to anticipate a handsome increase of the company's business before the end of the year. The company partially constructed a reservoir large enough to prevent a recurrence of last year's failure in water supply. The reservoir can be completed at small expense in time to be filled in case it will be needed for next summer's supply.

SAN JOAQUIN ELEC. CO.

[Company's Seal] JOHN J. SEYMOUR,
President.

J. M. COLLIER, Secty.

Q. Did you ever receive any other statements in regard to the condition of the San Joaquin Electric Company?

A. Yes, sir, I received statements every month from the time of its organization, down to August, 1899.

(Deposition of Charles H. Coffin.)

Q. Did you ever receive any statements as to the condition of the San Joaquin Electric Company on June 30, 1899? A. Yes, sir.

Q. Look at that paper which I now hand you, and state whether or not that is the statement that you received? A. Yes, sir.

Mr. BUELL.—We offer that statement in evidence, which is in words and figures following, to wit:

(Objected to by counsel for complainant, as incompetent, irrelevant and immaterial.)

Statement offered in evidence marked "Exhibit No. 2," and is in words and figures following, to wit:

Exhibit No. 2.

STATEMENT OF THE FRESNO WATER CO.
and
THE SAN JOAQUIN ELECTRIC CO.
January 1st, '99, to June 30th, '99.

WATER CO.

Receipts:				
1899.	Balance,		1,003.47	
Jan. 1.	From consumer	3,625.97		
Feby.	From consumer	3,409.30		
Mch.	From consumer	3,822.65		
Apl.	From consumer	3,213.75		
May	From consumer	3,777.20		
June	From consumer	3,629.15	21,478.02	
	From banks and dividends		12,299,89	34,781.38

(Deposition of Charles H. Coffin.)

ELECTRIC CO.

Jan. 1.	Balance		1,188.35	
Jan. 30.	From consumers	3,912.71		
Feby.	From consumers	4,561.66		
Mch.	From consumers	3,840.87		
Apl.	From consumers	4,150.18		
May	From consumers	3,768.56		
June	From consumers	4,828.84	25,062.82	
	From banks, etc..		5,193.89	
Amt. due from city for which we hold warrants			2,833.58	
Amt. from Hanford branch since				
Jany.	1st at 600 per Mo.		3,600.00	37,878.64

WATER CO.

Disbursements:

1899.

Jany.	Salaries... . ...$	755.75		
	Construction . . .	403.00		
	Fuel and power..	1,040.85		
	Expense int. & repairs	350.28	2,549.88	
	Loans repaid ...		1,000.00	
Feby.	Salaries	747.65		
	Expenses, repairs, taxes, etc..	503.71		

(Deposition of Charles H. Coffin.)

	Construction . . .	58.66	
	Fuel and power..	938.99	2,249.01
	Loans repaid ...		1,883.65
Mch.	Salaries	642.00	
	Expense int. and repairs	384.03	
	Construction .. .	7.03	
	Fuel and power.	753.28	1,786.34
	Bond Int.		9,750.00
April.	Salaries	797.50	
	Expense int. and Taxes...	242.35	
	Construction ..	873.70	
	Power	500.00	2,413.55
	Loans repaid ..		2,500.00
May.	Salaries	722.00	
	Expenses taxes and int.. ...	354.93	
	Construction ..	702.80	
	Fuel and power.	700.00	2,479.73
	Loans repaid..		2,000.00
June.	Salaries	722.00	
	Expense, int. etc.	324.81	

(Deposition of Charles H. Coffin.)

	Construction ..	722.81	
	Fuel	500.00	2,269.62
	Loans repaid ..		3,893.45
			34,775.23

ELECTRIC CO.

1899.			
Jany.	Salaries	1,203.40	
	Expenses, taxes and int...	367.80	
	Construction ..	624.40	
	Gen. supplies .	680.58	2,876.18
	Loans repaid .		2,100.00
Feby.	Salaries	507.85	
	Genl. supplies .	610.77	
	Construction ..	504.85	3,025.62
	Loans repaid ..		2,400.00
Mch.	Salaries	1,366.31	
	Expense int. and repairs..	630.11	
	Genl. supplies .	213.81	
	Construction ..	258.77	2,469.00

(Deposition of Charles H. Coffin.)

	Loans repaid ..		4,875.00	
April.	Salaries	1,184.29		
	Expenses int. and repairs .	361.99		
	Genl. supplies.	291.65		
	Construction ..	447.21	2,285.14	
	Loans repaid...		1,650.00	
May.	Salaries	1,511.05		
	Expense, int., and repairs .	670.05		
	Genl. supplies .	465.67		
	Construction ..	317.90	2,964.67	
	Loans repaid...		1,000.00	
June.	Salaries	1,093.00		
	Expense, int., etc.	962.75		
	Genl. supplies.	319.81		
	Construction ..	474.42	2,849.98	
	Loans repaid...		5,676.06	
	Pd. Hanford extension to apply on a|c construction of same		3,600.00	37,771.65
				72,546.88
				113.14
				72,660.02

(Deposition of Charles H. Coffin.)

TRIAL BALANCE.

SAN JOAQUIN ELECTRIC CO.,

June 30, '99.

Treas.	106.99
Property	2,177.45
Perm. imps.	800,000.00
Water Co.	165,000.00
Profit and loss	39,682.49
Bonds on hand	31,000.00
Real est.	625.36
Mdse.	111.97
Hanford extension	33,590.33
Carbon a|c	379.63
Expense a|c	1,240.83
Mercantile Trust Co.	31,500.00
New construction (Water res)	709.51
Construction a|c	356,502.50
Salary	7,857.65
Int., 933.06; Taxes, 1,206.82	2,139.88
Repairs, 231.56; Arc supplies, 145.35	376.91
Legal expense	576.53
Sundry a|c due us	680.07
	1,474,258.10
Capital stock	790.000.00
Bond a|c	555,000.00
Bills payable	17,750.00

(Deposition of Charles H. Coffin.)

Genl. Elec. Co.	6,380.37
Bond int.	31,500.00
Current sold	27,078.54
Water Co.	18,066.20
Lacy & Co. (Hanford Line)	23,114.08
Sundry Local a|c we owe	5,368.91
	1,474,258.10

TRIAL BALANCE.

FRESNO WATER CO.

June 30, 1899.

Treas.	6.15	
Perm. imps.	637,044.14	
Franchise	5,000.00	
Bond int.	24,375.00	
Power	3,000.00	
Expense a|c	1,279.21	
Taxes and int.	548.03	
San J. Elec. Co.	18,066.20	
Fuel	552.46	
Repair	419.38	
Salary	4,386.90	
Real Estate	20,660.25	
Capital stock		325,000.00
Bond a|c		325,000.00
Loss and gain		21,468.84

(Deposition of Charles H. Coffin.)

Sundry Water Col.	162.48	
Tapping	97.50	
Water collections.	21,140.37	21,400.35
Fresno Natl Bank		2,284.09
Other a|c		628.69
Crane Co. (disputed)		4,930.75
Ill. Trust & Sav. Bk. (Int.)...		14,625.00
	715,337.72	715,337.72

Q. Did you receive a statement from the San Joaquin Electric Company, dated April 30, 1890?

A. Yes, sir.

Q. Look at the paper, which I now hand you, and state whether or not that is the statement that you received?

A. Yes, sir, I received it in a letter from the secretary of the company dated May 18, 1899.

Mr. BUELL.—We offer that statement in evidence, which is in the words and figures following, to wit:

(Objected to by counsel for complainant, as incompetent, irrelevant, and immaterial.)

Statement offered in evidence marked "Exhibit No. 3," and is in words and figures following, to wit:

(Deposition of Charles H. Coffin.)

Exhibit No. 3.

STATEMENT FRESNO WATER CO.

30th APRIL, 1899.

Real Estate	$20,660.25	
Permanent improvements	636,540.80	
Treasurer	17.71	
Franchise	5,000.00	
Interest on bonds	21,125.00	
Power	2,000.00	
Office expense	297.81	
Taxes	271.28	
Interest	119.60	
San J. E. Co.	20,613.22	
Expense	537.50	
Fuel	552.46	
Repair	205.58	
Salary	2,942.90	
Capital stock		$325.000.00
Bond account		325,000.00
Loss and gain		21,468.84
Sundry water col....		157.70
Fresno National Bank		3,500.15
Crane Company		4,962.50
Union Oil Co.		200.00
Illinois Trust & Sav. Bank		11,375.00
Tapping		77.50

(Deposition of Charles H. Coffin.)

Krogh Manufacturing Co.		851.10	
Westinghouse Elec. Co.		533.00	
Water collections....		13,758.32	
Liddell		2,000.00	
O. J. Woodward.....		2,000.00	
		710,884.11	710,884.11
Receipts.			
1899. Bal. Jan. 1, 1899.		1,003.47	
January	3,625.97		
February	3,409.30		
March	3,753.50		
April	3,213.75	14,002.52	
From banks & individuals		9,144.15	
			$24,150.14
Floating Indebtedness:			
Banks and individuals.	$ 7,500.00		
Due on open accounts.	1,584.10		
Bonded interest 7 mo..	11,375.00		20,459.10
Assets:			
Uncollected accounts...	$570.10		
Balance on hand.....	17.71		
San J. E. Co.....	20,613.22		21,201.03

(Deposition of Charles H. Coffin.)

STATEMENT OF SAN JOAQUIN ELECTRIC CO.

April 30th, 1899.

First National Bank	$422.83
Property account .	2,067.45
Permanent Imps...	800,000.00
Fresno W. stock..	165,000.00
Profit and loss....	39,682.49
Bonds on hand....	31,000.00
Real estate	625.36
Mdse.	60.92
Hanford exten. con.	33,199.63
Carbon a|c	298.12
Expense	1,348.61
Interest	434.80
Interest account ..	26,250.00
Water Storage	115.35
Salary a|c	5,322.00
Construction a|c ..	356,226.35
Arc light supplies	93.57
F. J. Burleigh....	29.97
Hopkins Agl. Wks.	160.60
T. W. Taggart	2.70
D. Darden	20.36
Taxes	51.46
San J. Mining Co..	169.85
Wm. Mayne	30.00
W. Leavitt	50.00
Russell	73.50

(Deposition of Charles H. Coffin.)

Oakland Iron Wks.	2.04	
Repair a|c	171.81	
Capital stock		$790,000.00
Bond a|c..		555,000.00
Bills Payable		17,750.00
General Elec. Co...		6,442.91
Mercantile T. Co...		26,250.00
Current		18,126.69
Water Co..... ..		20,613.22
Lacy Co.		23,923.38
Individual accounts		4,803.57
	1,462,909.77	1,462,909.77

Receipts:

Bal. in bank. Jan 1, '99		$1,188.35
Jany. current sales.....	$4,249.30	
Feby. current sales.....	4,863.20	
March current sales	4,194.47	
April current sales.....	4,439.72	
Supplies sold during Jan. Feby. and March.....	967.63	18,714.32
Received from banks...	4,450.00	
Received on account...	151.10	4,601.10
		$24,503.77

Floating Indebtedness:

Bills payable....	17,750.00
General Electric Co.....	6,442.91
Water Co.....	20,613.22

(Deposition of Charles H. Coffin.)

Due employees..	4,121.05	
Open accounts....	682.52	
Bond Interest.... .....26,250.00		75,859.70

Assets:

Bal. on hand..	422.83	
Unpaid accts. current...1,728.02		
Ledger acct.	1,089.02	2,817.04
Bonds on hand 31,000.00		34,239.87

Q. Did you receive any letter accompanying the statement last offered in evidence? A. Yes, sir.

Q. Look at the letter which I now hand you, and state whether or not that is the letter that accompanied the statement?

A. That is the letter enclosing the statement.

Q. Do you know the signature of that letter?

A. I do.

Q. Is that the signature of J. M. Collier, Secretary?

A. Yes, sir.

Q. He was secretary of the company at that time?

A. Yes, sir.

Mr. BUELL.—We offer that letter in evidence, which has been shown to the witness, and ask to have the same marked Exhibit No. 4, which is in words and figures following, to wit:

(Objected to as incompetent, irrelevant, and immaterial.)

Letter offered in evidence, marked Exhibit No. 4, and is in the words and figures following, to wit:

(Deposition of Charles H. Coffin.)

Exhibit No. 4.

J. J. Seymour, Prest. & Mangr. J. M. Collier, Sec.
J. S. Eastwood, Vice-Prest. & Supt.

SAN JOAQUIN ELECTRIC CO.

Fresno, Cal., May 18, 1899.

C. H. Coffin, Esq., 215 Dearborn St., Chicago, Ill.

Dear Sir: Enclosed herewith find a hastily prepared statement of the Water and Electric Companies from January first to May first.

You will notice that the receipts for the past four months for current and supplies, amounts to $18,714.32. Included in this amount, however, is $600 per month from the Hanford Extension which is applied directly to reduce the cost of constructing said line. There is accrued since January first—owing to the delinquency by the City, $1,728.00 which, added to the $18,714.00, would make a total of $20,422, or about $5,100 per month. The two plants seem to be in better condition now than for the past three years.

For the first time since starting up the Electric plant will be able to run the Water Company without the use of fuel, running now entirely with electric current.

I presume Mr. Seymour has written you fully the general details.

Very truly yours,

J. M. COLLIER,
Secretary.

Enclosure.

(Deposition of Charles H. Coffin.)

Q. You received a number of other letters from the officers of the company, did you not? A. Yes, sir.

Q. I will ask you whether or not you received a letter from J. M. Collier, secretary, dated July 11, 1899?

A. Yes, sir.

Q. Look at the letter which I now hand you, and state whether or not that is the letter which you received from J. M. Collier? A. Yes, sir.

Mr. BUELL.—We offer that letter in evidence as Exhibit No. 5, which is in the words and figures as follows, to wit:

(Objected to as incompetent, irrelevant, and immaterial.)

Letter offered in evidence marked Exhibit 5, and is in the words and figures following, to wit:

Exhibit No. 5.

Fresno, Cal., July 11, 1899.

Chas. H. Coffin, Esq., Chicago, Illinois.

Dear Sir: I have been shown an extract from your letter to Mr. Seymour, in which you request statements of the two companies since January first. In compliance I herewith enclose detailed statement of expenditures and receipts by the month since January first to June 30th. Also trial balance from the two companies showing the amount owing us and the amount we owe.

From the foregoing you will see that it has been impossible for us to make any provision to meet the July interest of the San Joaquin Electric Company Bonds.

(Deposition of Charles H. Coffin.)

Mr. Seymour was called to New York by telegrams on the 1st from Mr. Street and may see you on his return.

Trusting that this will give you a true insight to the business of the two companies, I remain,

Very truly yours,

J. M. COLLIER,
Secretary.

Enclosure.

Q. Mr. Coffin, did you know of any negotiations tending to a reorganization of the San Joaquin Electric Company?

(Objected to by counsel for complainant as incompetent, irrelevant, and immaterial.)

A. Yes, sir.

Q. When were the first negotiations entered into and by whom?

(Objected to by counsel for complainant, as incompetent, irrelevant, and immaterial.)

Q. State all the facts in connection with it?

Same objection by counsel for complainant.

Q. The first negotiations began in April, 1898, in London, and were conducted by C. H. Coffin and William O. Cole, representing the San Joaquin Electric Company, and Captain Nares representing the Fresno Water, Land & Irrigation Company. It contemplated the absorption of the San Joaquin Electric Company, and the Fresno Water Company by the Fresno Canal & Irrigation Company.

(Deposition of Charles H. Coffin.)

Q. On whose behalf were the negotiations conducted by Captain Nares?

A. On behalf of the Fresno Land & Irrigation Company, which was owned by several large English Trust Companies.

Q. Was the American Securities Agency, Limited, in any way interested in these negotiations?

A. No, sir.

Q. Were Messrs. Seymour and Eastwood, or either of them, interested in these negotiations?

A. Mr. Cole and I represented their stock.

Mr. WOOD.—It is understood that all these questions are answered subject to my objection.

Mr. BUELL.—Oh, yes.

Q. These negotiations were not carried through?

A. They finally failed in December, 1898.

Q. Do you know of any other negotiations of any character tending or leading to the reorganization of this Company?

A. Yes, sir. All the parties interested in the property were presented with a plan of reorganization, which I drew up early in January, 1899.

Q. Who were interested in that?

A. The general Electric Company, which is in New York by Dr. Addison, their California agent; Charles F. Street of Street, Wykes, and Company, representing the American Securities Agency, who claimed to represent a majority of the bonds of the San Joaquin Elec-

(Deposition of Charles H. Coffin.)

tric Company, Mr. Elijah Coffin of Schenectady, New York, and London, England, representing $43,000.00 of the bonds of the San Joaquin Electric Company; the British Linen Bank of London, England, representing nearly one-half of the bonds of the San Joaquin Electric Company; E. H. Gay of Boston, representing the bondholders of the Fresno Water Company; Mr. John J. Seymour and Mr. Eastwood holding a majority of the stock of the San Joaquin Electric Company, and Mr. Drexler of San Francisco, representing the owners of the Gas Company at Fresno. That is all.

Mr. WOOD.—When was that meeting held, did you state, Mr. Coffin? A. No meeting was held.

Q. Well, you said you drew up a plan of reorganization?

A. Which was submitted to them. Mr. Street was here and consulted me about it, and the other interests were all consulted by letters. Mr. Elijah Coffin was here.

Mr. BUELL.—When was the subject of these negotiations, the last negotiations of which you testified, first opened or contemplated, that you know of?

A. Early in January, 1899. There had been previous conversations with some of the parties in interest.

Q. With the same idea in view? A. Yes, sir.

Q. That was before there had been a default in the payment of the interest due on January 1, 1899, on the bonds of the San Joaquin Electric Company, was it not?

(Deposition of Charles H. Coffin.)

A. The first consultations and conversations were held prior to that time.

Q. In which you had in contemplation the reorganization of the company? A. Yes, sir.

Q. Look at the paper which I now hand you, Mr. Coffin, and state if you are familiar with that plan of reorganization? A. Yes, sir.

Q. By whom was that formulated and presented, if you know?

A. This is the plan that was prepared by Charles F. Street, indorsed by the American Securities Agency, and submitted to the bondholders of the San Joaquin Electric Company in London.

Q. When was that plan first contemplated, if you know, about what time?

A. In January, 1899, or February, 1899, I am not sure which. I think in January.

Q. Does that plan in any way grow out of or is it connected with the conversation which you had with Mr. Street prior to January 1, 1899?

Mr. WOOD.—You may add to the objection which I have already made, this further objection, on the ground that it is merely hearsay, on the witness' part as to his knowledge of what took place in London.

Mr. BUELL.—How do you know it was presented to the bondholders in London?

A. I was the holder of two of the bonds and received this plan from the American Securities Agency.

(Deposition of Charles H. Coffin.)

Q. Was there any notice that this was to be presented to the bondholders?

A. My recollection is that the notice was that they had considered it, and approved it, in London.

Q. Now, read my question that is not answered.

(Question read as follows: "Does this plan in any way grow out of, or is it connected with the conversations which you had with Mr. Street prior to January 1, 1899?")

A. I don't know.

Q. You don't know? A. No, sir.

Q. Mr. Buell, we offer the plan of reorganization shown the witness, and identified by him in evidence, dated March 30, 1899.

(Objected to by counsel for complainant as incompetent, irrelevant, and immaterial.)

Plan offered in evidence marked Exhibit No. 6, and is in the words and figures following, to wit:

Exhibit No. 6.

THE AMERICAN SECURITIES AGENCY, LIMITED.
Registered Address for Cable or Telegram, 46 Queen Victoria Street, "Platonical," London.

London, 30th March, 1899.

PROPOSED PLAN OF REORGANIZATION.

SAN JOAQUIN ELECTRIC COMPANY.

It is proposed to organize a new Corporation, capitalized as follows:

(Deposition of Charles H. Coffin.)

First—Capital stock authorized and issued....$750,000.

First mortgage prior lien 5 per cent 40-year gold bonds.

Authorized issue..... ..... 300,000.

Actual immedate issue..... 175,000.

Consolidated mortgage 4 per cent 40-year gold bonds.

Authorized issue .... 300,000.

Actual immediate issue..... 257,000.

Second.—Of the new securities, the present holders of bonds shall receive for each $1,000 bonds deposited.

New consolidated mortgage 4 per cent bonds..... .... 600.

4 shares fully paid capital stock..... 400.

Third.—Underwriters will be asked to subscribe at 90 for $175,000 prior lien bonds, required for new capital requirements and expenses of reorganization.

For each $900, subscribers will receiver 5 per cent prior lien bonds..... 1,000.

20 shares fully paid capital stock..... 2,000.

Fourth.—$100,000 of the capital stock will be issued to certain parties in Fresno, for the water rights transferred by them, to the old company, providing they facilitate the foreclosure of the mortgage.

(Deposition of Charles H. Coffin.)

Fifth.—Depositing bondholders to have the right to subscribe for new prior lien bonds in proportion to their present holding.

Sixth.—All of the stock subscribed for by underwriters shall be deposited with the American Securities Agency, Limited, so that the control of the company may be permanently in the hands of the representatives of the bondholders.

Seventh.—Inasmuch as the expenses of reorganization will be provided for by the issue of prior lien bonds, no further assessment beyond the ½ per cent already paid will be made.

Q. Have you had any conversation with Mr. Street in regard to this proposed plan of reorganization just shown you? A. Yes, sir.

Q. Was anything said as to whether or not that was presented to the bondholders in London?

A. Yes, sir.

Q. Was anything said as to when it was presented to them? A. Yes, sir.

Q. When was it?

A. About the close of January or early in February, 1899. Mr. Street came here about January 20, 1899, and discussed my plan of reorganization, of which he expressed his entire approbation, but stated that he had been instructed by the London people—

(Deposition of Charles H. Coffin.)

Q. Whom do you mean by the London people?

A. The American Securities Agency. To proceed to Fresno and make a complete examination, and report to London in person, if possible, which he did early in February, 1899.

Mr. WOOD.—I object to the answer, and move that it be stricken out on the ground that it is incompetent, irrelevant, and immaterial, and hearsay on the part of the witness.

Mr. BUELL.—Do you know that he reported in person in London?

A. He told me later on that he had done so.

Q. Mr. Coffin, in the proposed plan of reorganization shown you, and as set out in the bill of intervention, the following clause is inserted: "Paragraph 4th. $100,000 of the capital stock will be issued to certain parties in Fresno for the water rights transferred by them to the old company, providing they facilitate the foreclosure of the mortgage." Do you know who is referred to by "Certain parties in Fresno?"

A. Yes, sir. John J. Seymour, and Mr. Eastwood are the parties in Fresno referred to.

Q. What were their official connection with the Company at that time?

A. John J. Seymour was president and Mr. Eastwood vice-president, of the San Joaquin Electric Company, and they were the owners of a majority of the stock of the company.

(Deposition of Charles H. Coffin.)

Q. What was the relation between the San Joaquin Electric Company and the Fresno Water Company on January 1, 1899?

A. The San Joaquin Electric Company was the owner of all the shares of stock of the Fresno Water Company.

Q. And the Fresno Water Company was really a part of the San Joaquin Electric Company?

A. Yes, sir, it was its property.

Q. When was that property of the Fresno Water Company acquired by the San Joaquin Electric Company?

A. About June, 1895, shortly after the San Joaquin Electric Company was organized.

Q. How long did the San Joaquin Electric Company continue to own and control the property of the Fresno Water Company? A. It does yet.

Q. The same relations exist between them to-day?

A. Yes, sir.

Q. Mr. Coffin, how long have you been engaged in the business of investment securities?

A. Since 1867.

Q. In connection with that business have you ever had any occasion to investigate and determine as to the solvency or insolvency of companies of this character?

A. Yes, sir, I have had sixty-three of them under my control at one time and another.

Q. Have you had, during that time, any occasion to examine the statements of other companies, similar to statements furnished by the officers of the San Joaquin Electric Company, which has been offered in evidence?

(Deposition of Charles H. Coffin.)

A. Yes, sir.

Q. You have examined the figures, have you, that were submitted to you by the officers of the San Joaquin Electric Company, as shown in the statements which were furnished you and which have been offered in evidence? A. Yes, sir.

Q. From the statements furnished to you by the officers of the San Joaquin Electric Company, as to the condition of the Company on January 1, 1899, which has been offered in evidence, do those figures show the company to be solvent or insolvent?

(Objected to by counsel for complainant, as incompetent, irrelevant and immaterial, and it is understood that counsel for complainant objects to all this line of examination, for the reasons stated.)

A. Solvent.

Q. From the figures shown in the statements furnished you of the condition of the company on July 1st. or June 30, 1899, do those figures show the company to be solvent or insolvent.

A. They show the company to be solvent.

Q. Can you state on what you base your judgment as to the solvency of the company?

A. The balance sheets submitted monthly, together with the statements in evidence show the company to have a surplus income in excess of its expenses for the six months from January 1, 1899, to June 30, 1899, of $42,328.16.

(Deposition of Charles H. Coffin.)

Q. How much would it have required during that period to have met the interest on the bonds to have prevented a foreclosure?

(Objected to by counsel for complainant as incompetent, irrelevant, and immaterial.)

A. $26,250.00.

Q. What surplus would that leave over and above the amount required to meet the interest on the bonds?

A. $16,078.16.

Q. Was anything said to you during the latter part of 1898, or the fore part of 1899, by Mr. Street as to whether he considered the company solvent or insolvent?

A. Yes, sir.

Q. State what he said.

A. He visited here about the 20th of January, and he agreed with me in conversation that from the statements submitted, the company was in a solvent condition.

Q. Did he give any reason or reasons why he thought a reorganization was necessary or desirable?

A. No.

Q. Do you know whether at the time the suit was commenced to foreclose the trust deed given to secure the bonds that the complainant, The Mercantile Trust Company, had notice or knowledge that the purpose of the foreclosure was to bring about a reorganization of the company, of the San Joaquin Electric Company?

(Objected to by counsel for complainant as incompetent, irrelevant, and immaterial.)

(Deposition of Charles H. Coffin.)

A. Yes, sir.

Q. Did they or did they not?

(Objected to by counsel for complainant as incompetent, irrelevant, and immaterial.)

A. They did.

Q. Was anything said by Mr. Street or by anyone connected with the American Securities Agency, Limited, as to whether or not the commencement of the foreclosure proceedings would depend upon an agreed plan for the reorganization of the company?

(Objected to by counsel for complainant, as incompetent, irrelevant, and immaterial.)

A. Yes, sir.

Q. What was said?

A. There was a negotiation for the surrender of our stock in order to avoid a foreclosure. Mr. Street came out here, and negotiated with the First National.

Q. Was that attempt to secure the stock to enable Mr. Street or the American Securities Agency, Limited, to complete a reorganization of the Company without foreclosure? A. Yes, sir.

Q. Was that because the American Securities Agency, Limited, or Mr. Street, considered that was necessary in order to prevent the foreclosure?

(Objected to by counsel for complainant as incompetent, irrelevant, and immaterial.)

A. No, sir, I don't think they considered it necessary.

Q. Or was it contemplated in order to get control of this company?

(Deposition of Charles H. Coffin.)

(Objected to by counsel for complainant, as incompetent, irrelevant, and immaterial.)

A. In order to cut out the stock and destroy it.

Q. And to get control of the company?

A. Yes, sir.

Mr. WOOD.—I object to the question as incompetent, irrelevant, and immaterial, and move that the answer be stricken out.

Mr. BUELL.—Q. Do you know whether or not it was a part of the scheme of foreclosure, and reorganization that John J. Seymour, president of the company should be appointed receiver in case the foreclosure of the trust deed or mortgage was instituted?

(Objected to by counsel for complainant as incompetent, irrelevant, and immaterial.)

A. Yes, sir. There was an agreement to that effect, I have been informed.

Q. By whom were you informed?

A. Mr. Seymour wrote me, and my recollection is that Mr. Street informed me that that arrangement had been made.

Mr. WOOD.—I object to that as incompetent, irrelevant and immaterial, and move that the answers be stricken out, on the grounds stated, and also as to what Mr. Seymour informed him on the ground that it is hearsay.

Mr. BUELL.—I guess that is all. You may cross-examine.

(Deposition of Charles H. Coffin.)

Cross-Examination.

(By Mr. WOOD.)

Q. Mr. Coffin, I believe you testified that you are a stockholder of the San Joaquin Electric Company?

A. Yes, sir.

Q. Are you familiar with the plant of the Electric Company? A. Yes, sir.

Q. In what way? A. I have been there.

Q. When were you there?

A. I don't remember.

Q. About when? A. When it was building.

Q. About when was that?

A. About 1896, in the summer.

Q. Have you been in Fresno since the year 1896?

A. I have not.

Q. From your own personal observation and inspection you know nothing about the physical condition of the property? A. I do not.

Q. From 1896 up to the time that these foreclosure proceedings were instituted, were you an officer of the company, of the San Joaquin Electric Company?

A. I was vice-president for a while.

Q. How long were you vice-president of it?

A. I don't remember.

Q. Well, about when?

A. Hold on. I am not sure I was either. No, let me correct that. I was not.

Q. You never were an officer?

(Deposition of Charles H. Coffin.)

A. I never was an officer.

Q. Were you ever a director of the company?

A. Yes, sir.

Q. For what period were you a director of it, about?

A. I think all the time up to 1899.

Q. Were you ever present at a directors' meeting, personally? A. No.

Q. From the year 1896, up to the time this suit was instituted, did you ever personally examine yourself the books of the Electric Company? A. No, sir.

Q. Your only knowledge of its financial condition is confined to the statements rendered to you by the secretary, and which have been introduced in evidence?

A. And examination made by experts employed by us for the purpose.

Q. Do you know Mr. Seymour and Mr. Eastwood?

A. Yes, sir.

Q. How long have you known them?

A. I have known Mr. Seymour about twenty years; Mr. Eastwood, since 1895.

Q. When did you last see them?

A. Mr. Eastwood was there in the fall of the year 1898, I think.

Q. Is that the last time you saw him?

A. Yes, sir.

Q. When was the last time you saw Mr. Seymour?

A. Not since 1897.

Whereupon the further taking of testimony is adjourned to Tuesday, October 23, 1900, ten o'clock A. M.

(Deposition of Charles H. Coffin.)

MERCANTILE TRUST COMPANY,
Complainant,

vs.

SAN JOAQUIN ELECTRIC COMPANY,
Defendant,

A. Y. CHICK and W. T. LEWIN,
Intervenors.

Tuesday, October 23d, 1900, 10 o'clock A M.

Parties met pursuant to adjournment.

Present: H. C. WOOD, Esq., Solicitor on Behalf of the Complainant.

C. C. BUELL, Esq., Solicitor on Behalf of the Intervenors.

Continuation of cross-examination of Charles H. Coffin.

(By Mr. WOOD.)

Q. Mr. Coffin, you stated that you were a stockholder of the San Joaquin Electric Company? A. Yes, sir.

Q. And you are now? A. Yes, sir.

Q. How many shares of stock do you own, Mr. Coffin?

A. I am really the owner of 2,650 shares. That is not all in my name.

Q. How much of it is in your name?

A. I was including stock belonging to Mrs. Coffin and stock owned by the First National Bank, some stock which I am interested in.

(Deposition of Charles H. Coffin.)

Q. I would like to have you state as fully as you can. A. I cannot say.

Q. Isn't it a fact, Mr Coffin, that all the stock that you own of the San Joaquin Electric Company is out of your control?

(The question was objected to by solicitor for intervenors, as incompetent, immaterial, and irrelevant)

A. It is not a fact, no. I have a certificate for 350 shares down in my box. That is not out of my control.

Q. You have a certificate for 350 shares?

A. Yes.

Q. That is now in your own possession?

A. Yes.

Q. Practically the rest of the stock outside of that is not; isn't that the fact?

(The question was objected to by solicitor for intervenors, as incompetent, immaterial and irrelevant.)

A. It is held under an agreement with the First National Bank of Chicago under my control.

Q. Mr. Coffin, isn't it a fact that all this stock of the San Joaquin Electric Company that once did belong to you is now owned by the First National Bank?

(The question was objected to by solicitor for intervenors, as incompetent, irrelevant and immaterial.)

A. It is not.

Q. Isn't the greater part of it?

A. Two thousand, two hundred shares, that is owned by them. It is held under an agreement between me and them.

(Deposition of Charles H. Coffin.)

Q. What is the nature of that agreement? Is it simply hypothecated there as collateral?

(The question was objected to by solicitor for intervenors, as incompetent, immaterial, and irrelevant.)

A. Yes, under a special agreement.

Q. Isn't it a fact that under that agreement the title to the stock is now in the First National Bank?

(The question was objected to by solicitor for intervenors, as incompetent, immaterial and irrelevant.)

A. It is not; it is in my name.

Q. Didn't you by that agreement transfer all your right, title and interest in and to the stock to the First National Bank??

(The question was objected to by solicitor for intervenors, as incompetent, immaterial, and irrelevant.)

A. Subject to my right to control it.

Q. What do you mean by "subject to your right to control it?"

(The question was objected to by counsel for intervenors as incompetent, irrelevant, and immaterial.)

A. I have a right to sell it or vote it.

Q. But the proceeds are to go to the bank?

(The question was objected to by counsel for intervenors as incompetent, immaterial, and irrelevant.)

A. Ninety per cent of it.

Q. So that all your original holding of stock was some 2,010 shares, I think you said?

A. Two thousand six hundred and fifty.

Q. Two thousand six hundred and fifty shares. Over

(Deposition of Charles H. Coffin.)

1,000 of those shares are held by the First National Bank, is that correct?

(The question was objected to by solicitor for intervenors as incompetent, immaterial, and irrelevant.)

A. Two thousand two hundred shares are held by them.

Q. Two thousand two hundred shares are held by the First National Bank? A. Yes, sir.

Q. In the manner previously indicated by you?

A. Yes, sir.

Q. Now, as regards the balance of those shares, Mrs. Coffin owns some of them?

(The question was objected to by solicitor for intervenors as incompetent, immaterial, and irrelevant.)

A. Yes.

Q. And you have some others of them absolutely in your possession?

(The question was objected to by solicitor for intervenors as incompetent, immaterial, and irrelevant.)

A. Yes.

Q. About 350 you stated? A. I think so.

Q. That absolutely belongs to you. It is not pledged or hypothecated?

(The question was objected to by solicitor for intervenors as incompetent, immaterial, and irrelevant.)

A. No, sir.

Q. Has there been any formal transfer on the books of the Company of the stock owned by you to the First National Bank?

(Deposition of Charles H. Coffin.)

(The question was objected to by solicitor for intervenors as incompetent, immaterial, and irrelevant.)

A. I think not.

Q. You think not? A. I think not.

Q. As a matter of fact, Mr. Coffin, isn't the bank the owner of the certificates with the understanding that you are their agent to sell them?

(The question was objected to by solicitor for intervenors as incompetent, immaterial, and irrelevant.)

A. No, they are held as collateral to my note.

Q. Mr. Coffin, you stated on your examination in chief the other day, that you knew that at the time the Mercantile Trust Company, the complainant, filed its bill to foreclose,that it had knowledge of the proposed plan of reorganization of the San Joaquin Electric Company. I would like to have you state how you knew that the Mercantile Trust Company had that knowledge?

A. At the time of the filing of the bill for foreclosure?

Q. Yes, and in answer to that question on your examination in chief as to whether or not you knew at the time the suit was commenced to foreclose the trust deed given to secure the bonds that the complainant, the Mercantile Trust Company, had notice or knowledge of the purpose of the foreclosure to bring about a reorganization of the San Joaquin Electric Company, you replied yes. I would like to have you state how you knew this?

A. My recollection is that Mr. Charles F. Street informed me that he had made a special bargain with them

(Deposition of Charles H. Coffin.)

to reduce the cost of foreclosure prior to the beginning of the suit.

Q. That is not responsive to the question. You testified that you knew at the time the suit was commenced by the Mercantile Trust Company that it had knowledge of the proposed plan of reorganization. How did you know it had any knowledge of the proposed plan of reorganization?

A. I would state from memory that Mr. Street informed me so.

Q. And is that all the knowledge you have, Mr. Coffin, of the knowledge of the Mercantile Trust Company as to this proposed plan of reorganization?

A. I did know, but I don't know now. I cannot tell you now, but I feel quite sure that I did know at that time that they did know it.

Q. That is what I want to get at. I want to have you state your means of knowledge. I will put another question which you can answer. Do you know of your own personal knowledge, Mr. Coffin, that at the time this suit was commenced that the Mercantile Trust Company, the complainant, had notice or knowledge that the purpose of the foreclosure was to bring about a reorganization?

(The question was objected to by solicitor for intervenors as calling for a conclusion.)

A. No.

Q. Then, Mr. Coffin, is it not a fact that you had no personal knowledge as to what the Mercantile Trust

(Deposition of Charles H. Coffin.)

Company knew at the time it filed this suit about the plan of reorganization? A. Only by hearsay.

Q. Did you ever employ any experts, Mr. Coffin, to examine the books of the San Joaquin Electric Company?

A. Yes, sir.

Q. Will you give me their names?

A. A Mr. Irving came down from Pasadena, a representative of an English Trust Company in California; J. M. Howells of San Diego an expert civil engineer. I think we sent out young Cole from our office.

Q. State when you had those examinations made, when you employed those gentlemen that you have just named to make examinations for you?

A. I was going to give another one, W. S. McMurtry, of San Francisco. I cannot tell you in answer to your last question exactly when the examination was made.

Q. About when did you employ these gentlemen that you have named?

A. I cannot tell you from memory.

Q. Well, about when?

A. Oh, we had somebody visit the plant in our interest at least as often as once a year.

Q. Yes, but did you have an examination made by these four or five gentlemen at or about the same time, that is within a few months?

A. No, at different times.

Q. Was it within the same year?

A. No, Irving's examination was in 1895, soon after the plant was started. I remember it was before the

(Deposition of Charles H. Coffin.)

plant was quite done. It might have been 1895 or early in 1896.

Q. When did you have the last examination of the plant made? About when, if you can't remember the exact date?

A. I don't know. I have got as many as a dozen expert engineer reports and one thing and another on it. I had three of them the other day with me when I came. They were made generally by experts in the interest of English Trust Companies to whom we were selling bonds.

Q. Did you as late as the year 1898 or 1899 employ anyone to examine the books of this company?

A. I cannot tell you.

Q. For what purpose were the experts that you have named employed for, to examine the physical condition of the plant or its books and financial condition?

A. Both. The last expert, I think was Dr. Addison, for the General Electric Company.

Q. I would like to have you state when the last report was made?

A. It was made by Dr. Addison, of the General Electric Company.

Q. When was that?

A. That was made when my plan of reorganization was presented.

Q. I think you testified that was in the year 1898?

A. In December.

Q. In December, 1898? A. Yes, sir.

Q. Was Dr. Addison employed by you or your firm?

(Deposition of Charles H. Coffin.)

A. No, by the General Electric Company.

Q. By whom was he employed?

A. By the General Electric Company.

Q. By the General Electric Company?

A. Yes, sir, they sent me his report.

Q. Now, did you, on your own behalf, or on behalf of yourself and any associates ever have any examination made after you received that report of Dr. Addison?

A. No.

Q. You did not?

A. No, I wrote him asking him to go down and examine it.

Q. He was the last person then that you employed to make an examination of it?

A. I did not employ him. We were negotiating for a reorganization of the company at the time. I had written several long letters to Dr. Addison on the subject and then I wrote him a letter asking him to go down and make a careful examination of it, which he did.

Q. Did you ever after asking him to make a careful examination of it ask anybody else to make an examination of it? A. No.

Redirect Examination.

(By Mr. BUELL.)

Q. Mr. Coffin, state fully what information you had in regard to the knowledge of the Mercantile Trust Company that the foreclosure was brought for the purpose of effecting a reorganization of the San Joaquin Electric

(Deposition of Charles H. Coffin.)

Company and the Fresno Water Company. Who, if anyone talked to you about it and what date?

(The question was objected to by solicitor for complainant as incompetent, immaterial, and irrelevant.)

A. My recollection is that I was informed of it by Mr. C. F. Street.

Q. At that time representing whom?

A. Representing the American Securities Agency and a majority of the bondholders.

Q. What did he say to you, if you remember?

(The question was objected to by counsel for complainant as incompetent, immaterial and irrelevant.)

A. We were discussing the plan of reorganization and I objected to his plan very strongly as entailing a very heavy expense. He stated that he had arranged with the Mercantile Trust Company to reduce the expense largely prior to the beginning of foreclosure.

Q. Mr. Coffin, do you care to make any correction in your statement as to your official connection with either the San Joaquin Electric Company and the Fresno Water Company? A. Yes.

Q. If so just state what correction you wish to make?

A. Since my testimony I recall the fact that I was vice-president of the Fresno Water Company from its organization until 1898, but I am not sure that I ever held an official position with the San Joaquin Electric Company.

Q. Other than as director? A. Yes.

CHARLES H. COFFIN.

Subscribed and affirmed to before me this 31st day of October, A. D. 1900.

[Seal] O. T. CODY,
Notary Public.

It is stipulated by and between the parties that the copies of the exhibits which are incorporated in the foregoing deposition may be taken and considered as the original exhibits and be used in lieu thereof.

State of Illinois, }
County of Cook. } ss.

I, the above-named Oliver T. Cody, of Chicago, Illinois, notary public in and for the county of Cook, and State of Illinois, named in the foregoing stipulation as the officer to take the deposition of the said Charles H. Coffin, the witness whose name is subscribed to the foregoing deposition, do certify that before the commencement of his examination as a witness in the above-entitled cause, he the said Charles H. Coffin, was duly affirmed by me to testify the truth in relation to the matters in controversy between the parties to said suit, so far as he, the said Charles H. Coffin, should be interrogated concerning the same; that the said deposition was taken at my office, 510, 100 Washington Street, in the city of Chicago, county of Cook and State of Illinois, the said examination being commenced on the 16th day of October, A. D. 1900, at the hour of 10 A. M., and continued by agreement of parties until October 23d, 1900, at the hour of 10 A. M., on which said last-mentioned date said deposition was completed,

and that after the said deposition was taken by me as aforesaid the interrogatories and cross-interrogatories and the answers thereto as written down were read over to the said Charles H. Coffin and thereupon the said deposition was signed and sworn to by the said Charles H. Coffin, before me at the place and on the date last aforesaid.

[Seal] O. T. CODY,
Notary Public.

[Endorsed]: 916. Coffin. Filed November 12, 1900. Wm. M. Van Dyke, Clerk. By E. H. Owen, Deputy.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

MERCANTILE TRUST COMPANY,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant.
A. Y. CHICK and W. F. LEWIN,
Intervenors.

Stipulation as to Taking Testimony of A. Y. Chick and John Hart.

It is hereby stipulated that the testimony of Alfred Young Chick and John Hart may be taken in the above-entitled cause on behalf of the intervenors A. Y. Chick and W. F. Lewin at the office of Richard Westcutt, Vice and Deputy Consul-General of the United States of

America at London, England, upon written interrogatories hereto attached, and the testimony of the said Alfred Young Chick and John Hart when so taken may be transmitted to the clerk of the United States Circuit Court in and for the Ninth Circuit, Southern District of California, at Los Angeles, California.

CHARLES MONROE,
ALEXANDER & GREEN,
Solicitors for Complainant.

_____,
Solicitors for Defendant.

GEORGE E. CHURCH,
L. A. GROFF,
WORKS & LEE,
(IRA W. & C. C. BUELL)
Solicitors for Intervenors.

The execution of this stipulation appears in certain schedules hereto annexed.

[Seal] RICHARD WESTCUTT,
Commissioner.

Interrogatories to be Propounded to Alfred Young Chick.

Interrogatory 1. Please state your name, residence and occupation.

Interrogatory 2. Please state whether or not you or the firm of A. Y. Chick & Company are the owners of any bonds of the defendant, San Joaquin Electric Company, and if you or either of you are the owner of any of said bonds state the number and amounts of said bonds and for how long a time you or the firm of A. Y. Chick & Company have been the holders of said bonds.

Interrogatory 3. Please state whether or not you ever attended any meeting of the bondholders of the said San Joaquin Electric Company in London, and if you did so attend when and where was it and at whose invitation did you attend and at whose instigation, if you know, was such meeting held. If there was more than one meeting of said bondholders please state the different times that you attended such meetings, at whose invitation you attended and at whose instigation such meetings were held, if you know.

Interrogatory 4. If in answer to the foregoing interrogatory, you have stated that you attended any meeting of the bondholders of said San Joaquin Electric Company, please state whether or not at any such meeting you, either for yourself or for the firm of A. Y. Chick & Company, authorized the Mercantile Trust Company to institute proceedings to foreclose the trust deed given to secure the bonds of the said San Joaquin Electric Company and whether or not you authorized or empowered the American Securities Agency, Limited or Mr. C. F. Street to act as the agent or attorney of you or the said firm of A. Y. Chick & Company to commence such foreclosure suit or to request the said Mercantile Trust Company to do so.

Interrogatory 5. Were you present at any meeting of the bondholders in which a scheme of reorganization of said company was presented to the bondholders, and if so at what meeting was it and who, if you know, presented said scheme?

Interrogatory 6. If in answer to the foregoing interrogatory, you have stated that a scheme of reorganization

was presented please state whether or not the proposed plan of reorganization as set out in the bill of intervention is a copy of the proposed plan submitted at such meeting of the bondholders.

Interrogatory 7. In the proposed plan of reorganization as set out in the bill of intervention a clause is contained therein as follows: "One hundred ($100.00) dollars of the capital stock will be issued to certain parties in Fresno for the water rights transferred by them to the old company providing they facilitate the foreclosure of the mortgage." Please state, if you know, who the "certain parties in Fresno" were.

Interrogatory 8. Please state any other facts in connection with any meeting of the bondholders of the said San Joaquin Electric Company held in London or in connection with any proposed scheme of reorganization of said company or any other facts in connection therewith of which you have knowledge and in regard to which you have not been interrogated in any of the foregoing interrogatories.

Cross-Interrogatories to be Propounded to Alfred Y. Chick.

Cross-Interrogatory 1. If in answer to the second direct interrogatory you say that you or the firm of A. Y. Chick & Co., are the owners of any of the bonds referred to, state in what manner and at what time you became the owners of such bonds, and what amount you paid for the same, and whether said bonds are now in your possession.

Cross-Interrogatory 2. If in answer to the first cross-interrogatory you say the bonds therein referred to are not

in your possession, state in whose possession they are and under what circumstances they came into such possession, and how and under what terms they are held.

Cross-Interrogatory 3. If in answer to the third and fourth direct interrogatories you state that you attended any meeting of the holders of any of the bonds of the San Joaquin Electric Company held in London, state whether or not there was at such meeting a resolution offered and passed, in effect instructing Charles F. Street —should the default on such bonds occur and continue— to instruct The Mercantile Trust Company, as trustee, of the mortgage securing the same, to proceed to take steps for the foreclosure of such mortgage.

Cross-Interrogatory 4. If in answer to the foregoing cross-interrogatory you say that any such resolution was offered at any such meeting attended by you, state whether or not you voted for such resolution, and if you state that you did not vote for such resolution, then state whether or not you voted against such resolution or did not vote.

Cross-Interrogatory 5. If in answer to the fifth direct interrogatory you state that a scheme of reorganization was presented to the bondholders at any meeting at which you were present, state what such scheme or schemes were, and if the same was in writing, attach a copy thereof to your answer to this cross-interrogatory.

Cross-Interrogatory 6. Did you not at or about the time when the holders of bonds of the San Joaquin Electric Company were being invited to deposit their bonds with the American Securities Agency, Limited, state, in effect, to F. H. Burr, the secretary of said Agency, that

you were unable at that time, on account of certain pending litigation in the United States, to produce and deposit your bonds, but that as soon as said litigation should have been disposed of said bonds would in due course be deposited with said American Securities Agency, Limited, under the plan of reorganization.

Cross-Interrogatory 7. If in answer to the seventh direct interrogatory you say that you know who "the certain parties in Fresno" were, and give the names of such parties, state how you learned the names of such parties, and that they were the parties referred to.

Cross-Interrogatory 8. State if you know whether any agreement has been made with said parties in Fresno to deliver to them any stock of the proposed new corporation, and, if so, by whom and to what amount.

Interrogatories to be Propounded to John Hart.

Interrogatory 1. Please state your name, residence and occupation.

Interrogatory 2. Please state what business relation, if any, you have sustained to Alfred Young Chick, W. F. Lewin or the firm of A. Y. Chick & Company during the past two years.

Interrogatory 3. Please state whether Alfred Young Chick or the firm of A. Y. Chick & Company are the owners of any bonds of the defendant, San Joaquin Electric Company, and if Alfred Young Chick or the firm of A. Y. Chick & Company are the owners of any of said bonds state the number and amounts of said bonds and for how long a time Alfred Young Chick or the firm of A. Y. Chick & Company have been the holders of said bonds.

Interrogatory 4. Please state whether or not you ever attended any meeting of the bondholders of the said San Joaquin Electric Company in London, and if you did so attend when and where was it, and at whose invitation did you attend, and at whose instigation, if you know, was such meeting held. If there was more than one meeting of said bondholders, please state the different times that you attended such meetings, at whose invitation you attended and at whose instigation such meetings were held, if you know.

Interrogatory 5. If in answer to the foregoing interrogatory you have stated that you attended any meeting of the bondholders of the said San Joaquin Electric Company, please state whether or not at any such meeting you, on behalf of the firm of A. Y. Chick & Company or any member of the firm of A. Y. Chick & Company, authorized the Mercantile Trust Company to institute proceedings to foreclose the trust deed given to secure the bonds of the said San Joaquin Electric Company, and whether or not you or any member of the firm of A. Y. Chick & Company authorized or empowered the American Securities Agency, Limited, or Mr. C. F. Street to act as the agent or attorney of the said firm of A. Y. Chick & Company, or either of them, to commence such foreclosure proceedings or to request the said Mercantile Trust Company to do so.

Interrogatory 6. Were you present at any meeting of the bondholders in which a scheme of reorganization of said company was presented to the bondholders, and if so at what meeting was it, and who, if you know, presented said scheme?

Interrogatory 7. If in answer to the foregoing interrogatory you have stated that a scheme of reorganization was presented, please state whether or not the proposed plan of reorganization as set out in the bill of intervention is a copy of the proposed plan, submitted at such meeting of the bondholders.

Interrogatory 8. In the proposed plan of reorganization as set out in the bill of intervention a clause is contained therein as follows: "One hundred ($100.00) dollars of the capital stock will be issued to certain parties in Fresno for the water rights transferred by them to the old company, providing they facilitate the foreclosure of the mortgage." Please state, if you know, who the "certain parties in Fresno" were.

Interrogatory 9. Please state any other facts in connection with any meeting of the bondholders of the said San Joaquin Electric Company, held in London or in connection with any proposed scheme of reorganization of said company or any other facts in connection therewith, of which you have knowledge, and in regard to which you have not been interrogated in any of the foregoing interrogatories.

Cross-Interrogatories to be Propounded to John Hart.

Cross-Interrogatory 1. State, if you know whether any agreement has been made with "certain parties in Fresno" to deliver to them any stock of the proposed new corporation, and, if so, by whom, and to what amount.

CONSULATE GENERAL OF THE UNITED STATES OF AMERICA, LONDON, ENGLAND.

Deposition of Alfred Young Chick.

Deposition of Alfred Young Chick and Isaac John Hart, witnesses sworn and examined the fifth day of November, in the year one thousand nine hundred, at the office of the Consulate General of the United States of America at London, England, situate at St. Helen's Place, Bishopsgate street, in the city of London, England, aforesaid, under and by virtue of a stipulation issued out of the Circuit Court of the United States, Ninth Circuit, Southern District of California, in a certain cause therein depending between Mercantile Trust Company, complainants, and San Joaquin Electric Company, defendants, A. Y. Chick, and W. F. Lewin, intervenors.

William Cocks, of No. 33 Chancery Lane, London, aforesaid, a stenographer and disinterested person, was appointed by the Commissioner to take down the deposition in shorthand, he being previously to the taking thereof duly sworn to take correct notes of the evidence in shorthand, and make a faithful transcript thereof into longhand:

ALFRED YOUNG CHICK, of No. 62 Old Broad street, in the city of London, England, being duly sworn to speak the truth, the whole truth, and nothing but the truth, deposeth, and says as follows:

(Deposition of Alfred Young Chick.)

First.—To the first interrogatory he saith: My name is Alfred Young Chick; my business residence is at No. 62 Old Broad street, in the city of London, England, and my occupation is that of dealer in foreign exchange, which business I carry on in partnership with William Flanders Lewin, under the style of A. Y. Chick and Company, at No. 62 Old Broad street, aforesaid.

Second.—To the second interrogatory he saith: Yes, my firm of A. Y. Chick and Company are the owners of $39,000 six per cent first mortgage bonds of the San Joaquin Electric Company, Nos. 49 and 50, 77 to 86, both numbers inclusive, 93 and 94, 101 to 107, both numbers inclusive, 233, 241, to 243, both numbers inclusive, 451 and 452, 557 and 558, 561 to 572, both numbers inclusive, 935 to 950, both numbers inclusive, and 990 to 1010, both numbers inclusive, making altogether 78 bonds of $500 each. My firm of A. Y. Chick and Company has held those bonds since the 25th February, 1898.

Third.—To the third interrogatory he saith: I attended one meeting and one meeting only of the bondholders of the said San Joaquin Electric Company by the invitation of the American Securities Agency, Limited, which was held at the offices of the said American Securities Agency, Limited, which were then at 45 Queen Victoria street, in the city of London, aforesaid. I cannot remember the date of this meeting, but I know it was subsequent to the 25th February, 1898, and speaking from memory, I should think this meeting was held

(Deposition of Alfred Young Chick.)

during the course of the year 1899. It is not my custom to keep a record of such a meeting, but I know that I attended that meeting at the invitation of the American Securities Agency, Limited, of Queen Victoria street, in the city of London. I have no personal knowledge of any other meeting of the said bondholders having been held. I certainly only attended one meeting. At that meeting, which was the only meeting at which I attended I stated publicly that I attended simply as a listener and intended to take no part in the proceedings, and I further stated that I declined to vote, and, as a matter of fact, I did not vote.

Fourth.—To the fourth interrogatory he saith: I answer all the matters propounded to me in this interrogatory absolutely in the negative.

Fifth.—To the fifth interrogatory he saith: At the only meeting which I attended, and to which I have alluded in my reply to the 3d interrogatory, there was no definite scheme of reorganization submitted. A scheme of reorganization was discussed generally, but it was in too crude a form for me to form any opinion in regard thereto.

Sixth.—To the sixth interrogatory he saith: I stated in my reply to the fifth interrogatory that no definite scheme of reorganization was submitted to me at the only meeting at which I attended, and I further say that I have never seen or read the proposed plan of reorganization as set forth, as alleged, in the bill of interven-

(Deposition of Alfred Young Chick.)

tion, and a copy of it has never been sent to me or to my firm.

Seventh.—To the seventh interrogatory he saith: I believe the "certain parties in Fresno" were Mr. Seymour and Mr. Eastwood.

Eighth.—To the eighth interrogatory he saith: I have nothing further to add to my previous replies.

Cross-Interrogatories.

First X.—To the first cross-interrogatory he saith: My firm became the owners of such bonds on the 25th February, 1898, and they received them as part collateral security attached to a bill of exchange for $44,000 drawn by the Municipal Investment Company, of Chicago, in London on the Municipal Investment of Chicago at Chicago, and which bill of exchange has been dishonored.

Second X.—To the second cross-interrogatory he saith: The said bonds are now in the possession of my firm. I say they are in the possession of my firm as part collateral security as stated by me in my reply to cross-interrogatory No. 1.

Third X.—To the third cross-interrogatory he saith: At the only meeting of the bondholders which I attended, and to which I have referred in my answer to the third direct interrogatory, I have no recollection of any such resolution being offered and passed.

Fourth X.—To the fourth cross-interrogatory he saith: As I have already testified in my reply to the

(Deposition of Alfred Young Chick.)

third direct interrogatory, I disclaimed all participation in the proceedings at such meeting, and stated that I only came there as a listener, and I did not vote.

Fifth X.—To the fifth cross-interrogatory he saith. As I have already deposed in my reply to the fifth direct interrogatory, no definite scheme of reorganization was presented to the bondholders at the only meeting at which I was present, and therefore, I am unable to attach a copy of such scheme to my deposition.

Sixth X.—To the sixth cross-interrogatory he saith: My reply to this cross-interrogatory is entirely in the negative.

Seventh X.—To the seventh cross-interrogatory he saith: I believe I heard of these names from some of the officials of the American Securities Agency, Limited, in discussing with them the matter in a friendly and unofficial way.

Eighth X.—To the eighth cross-interrogatory he saith: No, I do not know.

A. Y. CHICK.

Examination taken; reduced to writing; and by the witness subscribed and sworn to this fifth day of November, 1900, before me.

[Seal]

R. WESTCUTT,
Commissioner.

Deposition of Isaac John Hart.

ISAAC JOHN HART (described in the stipulation as "John Hart"), of No. 22 Great Winchester street, in the city of London, England, being duly sworn to speak the truth, the whole truth, and nothing but the truth, deposeth and says, as follows:

First.—To the first interrogatory he saith: My full name is Isaac John Hart (described in the stipulation as "John Hart"); my business residence is at No. 22 Great Winchester street, in the city of London, England, and I am by occupation a solicitor of the Supreme Court of Judicature in England.

Second.—To the second interrogatory he saith: I have acted as their solicitor for considerably more than two years last past.

Third.—To the third interrogatory he saith: In my professional capacity as legal adviser to the firm of A. Y. Chick and Company, I know that the said firm of A. Y. Chick and Company are the owners of certain bonds of the said San Joaquin Electric Company of the face value of $39,000, numbered 49 and 50, 77 to 86, both numbers inclusive, 93 and 94, 101 to 107, both numbers inclusive, 233, 241 to 243, both numbers inclusive, 451 and 452, 557 and 558, 561 to 572, both numbers inclusive, 935 to 950, both numbers inclusive, and 990 to 1010, both numbers inclusive, making altogether 78 bonds of $500 each. So far as I know in my professional capacity, the said firm of A. Y. Chick and Company have held the said bonds since the later part of February, 1898.

(Deposition of Isaac John Hart.)

Fourth.—To the fourth interrogatory he saith: I attended with Mr. Chick in my capacity as his legal adviser at what purported to be a meeting of the bondholders of the San Joaquin Electric Company, held at the then offices of the American Securities Agency, Limited, No. 45 Queen Victoria street, in the city of London, about the end of March, 1899, at the instigation, as I was informed, of the said American Securities Agency, Limited. That is the only meeting that I attended, and I only attended that meeting at the request of Mr. A. Y. Chick, and in my capacity, as I have before stated, as his legal adviser.

Fifth.—To the fifth interrogatory he saith: To the whole of this fifth interrogatory I reply in the negative.

Sixth.—To the sixth interrogatory he saith: No definite scheme of reorganization was presented at the only meeting that I attended, and to which I have referred in my reply to the fourth interrogatory, and I further say that the only thing that took place at that meeting was an informal discussion as to some scheme of reorganization, in which discussion my client, Mr. A. Y. Chick, took no part. My client, Mr. A. Y. Chick, was there only as a listener, and took no part in the proceedings, and I was there simply to watch on his behalf.

Seventh.—To the seventh interrogatory, he saith: I have already testified in my reply to the sixth interrogatory that no definite scheme of reorganization was laid before the meeting.

(Deposition of Isaac John Hart.)

Eighth.—To the eighth interrogatory he saith: I have no personal knowledge on this matter.

Ninth.—To the ninth interrogatory he saith: I do not know of any other facts.

Cross-Interrogatories.

First X.—To the first cross-interrogatory he saith: No, I do not know.

ISAAC JOHN HART.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this fifth day of November, 1900, before me.

[Seal] R. WESTCUTT,
Commissioner.

UNITED KINGDOM OF GREAT BRITAIN AND IRELAND, CITY OF LONDON, ENGLAND.

Commissioner's Certificate.

I, Richard Westacott, Vice and Deputy Consul General of the United States of America, at London, England, the Commissioner named in said stipulation, do certify that the witnesses, Alfred Young Chick and Isaac John Hart (described in the stipulation as "John Hart"), appeared before me at the office of the Consulate General of the United States of America, at London, England, situated at St. Helen's Place, Bishopsgate street, in the city of London, aforesaid, and after being respectively duly sworn, their evidence respectively was

taken down in shorthand by William Cocks, a stenographer and disinterested person employed by me for that purpose, and afterwards by him reduced to longhand, he having been previously to the taking thereof duly sworn to take correct notes of the evidence, and to make a faithful transcript thereof into longhand, and the said evidence so taken down and reduced to longhand was read over and corrected by the said witnesses respectively, after which they respectively subscribed the same in my presence on the fifth day of November, 1900, at the office of the Consulate-General at London, England, aforesaid, and that I have personal knowledge of the said witnesses respectively.

In witness whereof I have hereunto set my hand and affixed my official seal at London, England, this sixth day of November, 1900.

[Seal] R. WESTACOTT,
Commissioner.

[Endorsed]: 916. Opened and filed November 26, 1900. Wm. M. Van Dyke, Clerk.

At a stated term, to wit, the July term, A. D. 1900, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom in the city of Los Angeles, on Monday, the eighth day of October, in the year of our Lord one thousand nine hundred. Present: The Honorable OLIN WELLBORN, District Judge.

MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant.
No. 916.

Order Appointing Special Examiner.

On motion of John D. Works, Esq., of counsel for Intervenors Alfred Young Chick et al., and it appearing that all parties consent thereto, it is ordered that John W. Gearhart, Esq., be, and he hereby is, appointed a Special Examiner of this court, to take the testimony in this cause in the matter of the intervention of Alfred Young Chick et al., and to report said testimony when so taken to this court.

I, Wm. M. Van Dyke, clerk of the Circuit Court of the United States, for the Southern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original order made and entered by said court, October 8th, 1900, in the cause entitled Mercantile Trust Company, as Trustee, Complainant, vs. San Joaquin Electric Company, Defendant, No. 916, and now remaining of record therein.

Attest my hand and the seal of said Circuit Court this 8th day of October, A. D. 1900.

[Seal] WM. M. VAN DYKE,
Clerk.

[10c. Int. Rev. Stamp Canceled]

In the Circuit Court of the United States of America, Ninth Judicial Circuit, Southern District of California.

MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant,
And ALFRED YOUNG CHICK et al.,
Intervenors.
No. 916.

Report of Special Examiner.

Be it remembered, that on the 2d day of January, 1901, and on the several days thereafter to which the examination was regularly adjourned, as hereinafter set forth, and at the times mutually agreed upon by the parties in said cause, at my office in the courthouse of the county of Fresno, and at the office of the defendant herein, in the city of Fresno, county of Fresno, and State of California, in said District, before me, John W. Gearhart, who was on motion of John D. Works, Esq., of counsel for intervenors, and by consent of counsel for complainant and defendant, appointed Special Examiner by said Circuit Court to take testimony herein, and who duly qualified by taking oath as such Special Examiner before L. L. Cory, Esq., notary public in and for

(Testimony of W. R. Price.)

said county of Fresno, personally appeared the several witnesses whose names are hereinafter set forth, who were produced and examined on behalf of the respective parties to the above-entitled cause.

Messrs. Alexander & Green and Charles Monroe, per L. L. Cory, their representative, appeared as solicitors for the complainant, and John D. Works and George E. Church appeared as solicitors for the intervenors, no one appearing for the defendant.

The following is a correct report of the proceedings:

W. R. PRICE, being called as a witness for intervenors, and being duly sworn by the Special Examiner, all objections as to the competency of the witness having been waived by the complainant herein, now testifies as follows:

Direct Examination.

By Mr. CHURCH.—Now, just look at these papers (handing papers to witness). State what they are and how you made them up.

A. Well, this is a statement of the earnings and expenses of the Fresno Water Company for the years 1897, 1898, 1899. The first are the receipts for 1897, Then follows the operating expenses. Under that head, fuel, salaries, sundries, power and interest, with interest on bonds. Here we have the evidence obtained from the books of the company, furnished by the officers at their office; and the same for 1898 and 1899. The headings are the same, substantially the same, and I think exactly the same.

(Testimony of W. R. Price.)

Q. Now, as to the correctness of that, I suppose you can swear to it?

A. As to the correctness, I am willing to swear that the statement is correct, as shown by the books of the company.

(Paper referred to by witness is marked Intervenors' Exhibit "A" and appended hereto.)

The WITNESS.—Now, this is Statement of Earnings and Expenses of San Joaquin Electric Company for the years 1897, 1898, and 1899. The first portion of the statement shows receipts from consumers as so much. Under the head of Operating Expenses we have salaries, supplies, expense, repairs, power-house expenses, sub-station and interest, and the difference would be the net earnings. The bonded interest being a fixed amount, I have left it out of this statement, as I explained to you.

Mr. CHURCH.—Just state what you left out.

The WITNESS.—The memorandum I think you have, Mr. Church.

Q. Can you state without your memorandum?

A. I think it is $31,500.

Q. What is that item?

A. That represents the annual interest on bonds.

Mr. CORY.—Q. You have left that out of this statement?

A. I have left that out of this statement. I have simply aimed to show receipts and operating expense. That is what the statement shows; and I had a memo-

(Testimony of W. R. Price.)

randum accompanying this explaining that: I omitted from this statement the annual interest on the bonds, which I think amounts to about $31,500. At any rate, the statement, as I have it shows just what the items of expense are. And for 1898 the receipts are shown and then the operating expenses.

Mr. CHURCH.—Q. Is that what you have reference to (exhibiting paper to witness)?

A. Yes. My recollection was correct. It was $31,500 a year. This memorandum accompanied the statement to Mr. Church. (Reads:) "In the above statement I have not included in the expenses the item of bond interest, which is a fixed charge and amounts to $31,500 per year."

Mr. CORY.—Q. Does that apply to each year?

A. That applies to each year.

Mr. CHURCH.—Q. For how long a time?

A. 1897, 1898 and 1899, I cover by this statement.

Q. For each year, is that correct?

A. I think so.

Q. January 1st, 1899, was the time when the first interest became due?

Mr. CORY.—The interest became due right along. In 1899 they defaulted.

Mr. CHURCH.—Q. They paid up to that time? Does your statement show the interest up to that time had been paid?

(Testimony of W. R. Price.)

A It does not show anything about that. There has not been enough money collected in the years 1897, 1898 and 1899 to pay it.

Mr. CORY.—The running expenses and fixed charges?

A. The running expenses and fixed charges of interest.

Mr. CHURCH.—Q. This statement shows the exact state of affairs excluding that? A. Yes.

Mr. CORY.—Q. Shows the receipts and disbursements? A. Receipts and disbursements.

Mr. CHURCH.—Q. You have made no charge or credit with reference to the fixed interest?

A. None whatever.

Mr. CORY.—Q. Your statement is that the fixed interest charge is $31,500, and that there was not enough received—the receipts of the company were insufficient to pay the running expenses and that fixed charge?

A. Exactly. The receipts in 1897—net earnings, not including, of course, the charge of $31,500 for interest—the net earnings were $10,878.80. For 1898 the net earnings were $14,173.49. For 1899 they were $29,957.28.

Mr. CHURCH.—Yes, I understand. Now we will have that marked Intervenors' Exhibit "B." (Paper marked Intervenors' Exhibit "B" and appended hereto.)

(Testimony of W. R. Price.)

Mr. CHURCH.—Take those others.

A. This is "Statement of Resources and Liabilities of San Joaquin Electric Company, December 31, 1899."

Mr. CORY.—What you call a balance sheet?

A. Yes; it is what we call a balance sheet.

Mr. CHURCH.—Well, that is sufficient, as far as that is concerned. That shows what it is.

Mr. CORY.—Q. Does that show any fixed charge for interest, and things of that kind?

A. This shows the exact indebtedness of the company at this particular time, on December 31, 1899. It shows that the profit and loss account was overdrawn at that time nearly $10,000, and that the interest account—they charge up to bond interest $36,750. There was nothing in the interest account to pay that, but it was charged up to the account, and represents indebtedness of interest account.

Q. You may state from looking at that what was the difference between the assets and liabilities, how much that amounts to.

Mr. CHURCH.—Doesn't that show it right there?

Mr. CORY.—Q. In other words, did the books show that at that time they had sufficient assets on hand to pay the liabilities, including the interest?

A. Among the assets, of course, are items that are put down there, and as to the correctness of those items in representing the value of the property, I couldn't say.

Mr. CORY.—They are taken from the books.

(Testimony of W. R. Price.)

Mr. CHURCH.—Yes, what the books show and what your statement shows.

The WITNESS,—Well, now, your question, I think—if I understand it rightly—would mean this, that your profit and loss, and interest accounts are overdrawn there—

Mr. CORY.—Q. Did it show enough cash on hand to pay their current expenses and interest on bonded indebtedness at that time?

A. Well, the cash on hand—

Q. Bills receivable, in other words?

A. Cash on hand was a very small item, in fact would not cut any figure. What you want to get at is the earnings?

Q. The bills receivable, convertible into cash, practically?

A. Well, that would be a different matter, I think, Mr. Cory, because there are a great many of these items considered as assets that it would be hard for me to say whether they are convertible into cash or not, whether they are good assets, They would amount to $4,272.44, due from sundry individuals. It is probable some are good, and it is quite probable some are not good. Assuming that all of those were good, you have in that item alone, a little over $4,000. You have, due from First National Bank—that is cash on hand—you have, in round numbers, $250. You have another item in the resources which is carried under property account, and it represents different items, perhaps represents horses and

(Testimony of W. R. Price.)

wagons, or things of that kind, and that you use in your business.

Q. I want now to simply identify these papers and have them go in. As to the examination on the papers, we will take that up later. I understand you the paper in your hands shows resources and liabilities of the company? A. Yes, sir.

Q. At the end of the year 1899? A. 1899.

Q. Now, what are the resources as shown there? It is stated as a whole, isn't it? A. Yes, sir.

Q. And the items constituting the resources are also shown there? A. Yes, sir.

Q. And the liabilities. Now these items constituting the resources, you have taken from the books?

A. They have been taken from the books.

Q. Did you find on the books those items as a whole just as you have them there? For instance, you have here "Permanent Improvements, $800,000." Now did you find on the books $800,000 as the amount, exactly, of the permanent improvements of the company?

A. Yes; that is an amount carried on the books.

Q. You don't find that as one item, but it is permanent improvements, $800,000?

A. My recollection is that that amount is being carried forward from year to year, and probably was originally written in from different amounts, possibly previous to the time of those statements.

Q. That is what you found there?

A. That is what I found; yes.

(Testimony of W. R. Price.)

Q. Here is another item: "Construction, $363,990.-06." Is that item you have here made up of sundry items from the books, or is it one item on the book?

A. I think that has been an active account during the period of those statements.

Q. That is, during the three years?

A. During the three years. Yes, sir. The account was opened before that, but what it stood at, at the beginning of this statement, 1897—

Q. (Intg.) So far as the books are concerned, they show various items, and show the item under the head of liabilities just as you have them here?

A. Yes; resources and liabilities. (Paper marked Intervenors' Exhibit "C" and appended hereto.)

Q. Now, what is that other?

A. Well, this is statement of resources and liabilities of the Fresno Water Company, of the same date, that is, December 31, 1899.

Q. Well, then, the same thing will be said of that as you said of the other?

A. Yes. This of course is not so lengthy a statement.

Mr. CORY.—What is the purpose of showing anything with reference to the Fresno Water Company?

Mr. PRICE.—We understand that is a part of the resources of the Electric Company.

Mr. CHURCH.—I understand that is a part of the resources. I understand they have always regarded it as

(Testimony of W. R. Price.)

such. Now, Mr. Cory, as to any particular examination you want to make of Mr. Price, do you want to make it now?

Mr. CORY.—I am not prepared. I have not seen these statements. From your examination did you find that the company had sufficient funds on hand to pay their indebtedness that became due on the 1st of January, thereabouts, 1900?

A. There was not sufficient.

Q. There was not? A. No.

Q. Do you know about how much was the deficit, in round numbers?

Mr. CHURCH.—Answer the question as directly as you can.

A. I will, but I want to have a definite understanding about it. Of course, it has been assumed that the receipts and expenses, or that the profits of one would apply to the indebtedness of the other—

Q. What do you mean by "profits of one"?

A. Of the Fresno Water Company, would apply to the indebtedness of the Electric Company.

Mr. CORY.—I am asking you what your statement shows with reference to the Electric Company, without reference to your examination as to the Fresno Water Company, whether they had sufficient funds on hand to pay their obligations as they became due at the time of your examination, and you state they had not. Now I want to know if you can state generally about what

(Testimony of W. R. Price.)

the difference was, in other words, how much they owed more than they had funds and assets on hand to pay at that time?

A. My recollection now, without looking up the statement again, is $46,000, in round numbers.

Mr. CORY.—That is all at present.

Mr. CHURCH.—Q. Now, I might ask you what was done with the funds or resources that came in? You don't know, do you, except that they are paid out for certain things that you have specified?

A. They are represented under those heads.

Q. That is all you know about it?

A. Yes, sir.

Mr. CORY.—Q. You are testifying as to what the books show?

A. Yes, sir, exactly, what the books show. I didn't go behind that.

Mr. CORY.—Yes; I understand that.

(Papers referred to by witness as Statement of Resources and Liabilities of Fresno Water Company is marked Intervenors' Exhibit "D" and is hereto appended.)

Mr. CHURCH.—Perhaps you had better take those papers and look at them as soon as you can, and not keep Mr. Price now.

Mr. CORY.—Yes. It may be I don't care to examine him further. Maybe they are sufficiently explicit in themselves, and will not require any further examina-

(Testimony of J. J. Seymour.)

tion. I will submit them to Mr. Collier, and let him look over them, and if he has anything to suggest I may ask some questions, but for the present I have no questions.

J. J. SEYMOUR, being called as a witness for intervenors, and being duly sworn by the Special Examiner, now testifies as follows:

Direct Examination.

(By Mr. CHURCH.)

Q. What is you name?

A. My name is John J. Seymour.

Q. What relation do you occupy to this defendant, the San Joaquin Electric Company, Mr. Seymour?

A. Well, I am both president of the San Joaquin Electric Company and—

Mr. CORY.—That is what he asked you, just about the Electric Company.

Mr. CHURCH.—Q. You are, you say, president of the Company? A. Yes, also receiver.

Q. And you are at present receiver of the company, appointed in this action?

A. Yes, sir.

Q. By whom were you appointed receiver?

A. Judge Wellborn.

Q. At whose motion or request?

A. At the request of Messrs. Alexander & Green, I believe, the attorneys for the Mercantile Trust Company.

(Testimony of J. J. Seymour.)

Q. The complainant in this action?

A. Yes, sir.

Q. How long had you been president of the Electric Company?

A. Since its formation, about 1895, I think it was.

Q. Do you hold any official position relative to the water company, also, the Fresno Water Company?

A. Yes, sir.

Q. What is that?

A. I am the president of the Fresno Water Company.

Q. Well, do you know as a matter of fact, Mr. Seymour, whether the property of the water company is included in the deed of trust or mortgage deed given by the San Joaquin Electric Company, the defendant here, to secure the bonds or the indebtedness for which this suit was brought?

(It is here stipulated and agreed that either party, at the time of the reading of the depositions in open court, may thereupon make any and all objections or motions concerning the questions asked or the testimony introduced, except as to the form of the interrogatory.)

A. The stock of the Fresno Water Company is given in that.

Q. Is pledged with the other?

A. It is pledged with the other.

Q. As a matter of fact, had the Electric Company

(Testimony of J. J. Seymour.)

acquired all the stock of the Fresno Water Company at that time?

A. It has, except sufficient for voting purposes of the local directors.

Q. Merely a nominal amount?

A. Nominal holdings.

Q. Now, of course you have not your books and Mr. Collier is not here. He is the secretary, isn't he?

A. Yes.

Q. He keeps the books of both companies?

A. Yes, sir.

Q. Do you keep the accounts of the water company separately from the accounts of the electric company?

A. Entirely separately.

Q. Now, Mr. Seymour, this item of permanent improvements of $800,000, what does that include, as far as your knowledge goes?

A. I think that includes the bonds outstanding. No. That is stock, that amount, $800,000, the par value of the stock of the San Joaquin Electric Company. It was organized with a capitalization of $800,000.

Q. So this item of permanent improvements, of $800,000, is simply the par value of the stock?

A. Yes, sir.

Q. It don't represent the value of the property of the company, then? A. No.

Q. Do you know what the value of the property of the company, the plant, is?

A. No; but the trial balance will show.

(Testimony of J. J. Seymour.)

Q. But do you know the actual value now, or what it was in 1899? A. The actual value?

Q. Yes. You don't know anything about that, do you? A. I don't fully understand?

Mr. CORY.—About what the actual market value was at that time Of course, it would be simply an estimate.

A. Oh, I couldn't answer that question.

Mr. CHURCH.—Q. Now, in addition to that item of $800,000, there is the item here of construction, $363,990. What does that represent?

A. That represents, as I remember, money paid out for plant and construction.

Q. Everything belonging to the company, the property of the company?

A. Actual money paid out, yes.

Q. Well, then, that represents the actual cost of the property that you have acquired—that the electric company has acquired, does it?

A. Excepting the stock of the water company.

Q. Well, the stock of the water company is a separate item here? A. Yes, sir.

Q. Then this $363,990.06 is what the property of the electric company has cost in money?

A. In money, yes.

Q. How many of the bonds have you sold?

A. I think there are now out $525,000.

Q. What was the amount realized from the sale of those bonds?

(Testimony of J. J. Seymour.)

A. We sold the bonds at eighty per cent of the par value, with the exception of $165,000 in bonds which the trust deed mentions were paid for the stock of the water company, that was put in the hands of The Mercantile Trust Company.

Q. The $165,000 that you say was paid for the Fresno Water Company's stock and put in the hands of the Trust Company. Who were the holders of the Fresno Water Company's stock when you acquired it?

A. Various people. I think Mr. Gray owns some yet. I own a little.

Q. Well, it is not necessary to specify who the parties were. A. Different parties.

Q. You say this $165,000 of the bonds of the electric company were placed in the hands of the complainant here, The Mercantile Trust Company?

A. No. The entire stock of the Fresno Water Company was placed in the hands of The Mercantile Trust Company after it was purchased by the $165,000 in bonds of the San Joaquin Electric Company.

Q. Then the bonds of the Electric Company, $165,000 worth, we will say, were given to the owners of that stock?

A. Yes, sir.

Q. Various owners? A. Various owners.

Q. And the stock passed over to The Mercantile Trust Company and they hold it in trust the same as the other, of course. Now was it exactly $165,000 of the bonds of the Electric Company, par value? A. Yes.

(Testimony of J. J. Seymour.)

Q. And is that in addition to the other bonds that were issued or a part of the bonds issued?

A. That is a part of the $525,000 bonds issued.

Q. Then you take, do you, to get this $363,900 value of the construction, you deduct, first, the $165,000 from the bonds issued by the Electric Company, and the balance you sold at 80 per cent?

A. Yes. And in addition to that there is probably some of the revenues of the company that goes to make that. I don't know. I can't strike the balance in my mind now, but it is very probable that it will exceed the eighty per cent.

Q. What I want you to get at, Mr. Seymour, if I can, is, did that consume the whole of what you realized from the sale of that $525,000 or $550,000 of bonds, the $165,000 and this $363,990, or is part of this $363,990 a part of the money that the company has earned since?

A. I couldn't answer that question without making some calculations.

Q. From the books?

A. Well, yes, from the books, and from knowing what we realized—

Q. What I want to get at is simply to find out how much money the company has realized, actual money, and what has actually been done with that money. Now will you make a statement of that, so we can get it, in some form?

A. Well, as I told you, we sold the bonds at eighty dollars on the hundred.

(Testimony of J. J. Seymour.)

Q. But you can't tell that exactly. Will you make a statement, Mr. Seymour—so that we need not keep you here—will you make a statement showing the exact amount of money that you realized from the sale of the bonds, and also the amount of money the company has earned, and then exactly how much of it has been put into the property, and what property it is that the company has acquired? You understand what I want?

A. Well, as I stated before, there was five hundred and—

Q. (Intg.) Well, Mr. Seymour, you can very readily get that from your books, and if you will make up a brief statement, so we can put it in the record, it would be what I would rather have. What you would give us now would be from memory. I may ask you a question or two further. I find among the resources the Hanford Extension, $34,865.26. In other words, the Electric Company has acquired the Hanford Extension, so called.

A. It constructed the Hanford Extension.

Q. It constructed it? A. Yes, sir.

Q. Didn't Lacy & Company have something to do with that matter?

A. They advanced the money or the major part of the money, and we were to allow them to pay that out by the current they used.

Mr. CORY.—They were to pay so much for the current used and instead of paying it to the Electric Company they advanced the money and it was applied from month

(Testimony of J. J. Seymour.)

to month on this indebtedness and they were to own this property until it was fully paid for and then it was to be turned over to the company? A. Yes, sir.

Mr. CHURCH.—Q. And you carry it on the books as a part of the resources of the company, that amount, $34,865, or whatever it is, for the Hanford Extension?

A. I couldn't tell you, without an examination of the books.

Q. Can you tell what the earnings of that Hanford Extension are?

A. They have been $600 a month since it was constructed, that is, the gross earnings have been. That would be $7,200 a year.

Q. You don't know what the net earnings amount to?

A. Well, as far as we are concerned, there are no net earnings now, because we get no money from it. They first pay the interest charge on the money they advanced and the remainder is applied on the indebtedness, thus reducing it from month to month.

Q. I know, but isn't it operated by you as receiver now? A. Yes.

Q. The Hanford Extension? A. Yes.

Q. Don't you, then, as receiver, pay the expenses of the operation of the line, and haven't you been doing so?

A. There are no expenses of the operation of the line.

Q. If there are no expenses, would that not be net earnings?

(Testimony of J. J. Seymour.)

A. As far as our company is concerned, everything over and above the interest on the money is applied on the principal, thus reducing it from month to month.

Mr. CORY.—It is really net, because part of it is applied on the principal and a portion of it on the interest?

A. We can't use it except for that one purpose.

Mr. CHURCH.—Q. But there are some expenses in operating that portion of the line?

A. Well, it is simply a pole line.

Q. Then there are actually no expenses?

Mr. CORY.—Practically none. Of course, if the pole line breaks, or something of that kind, they will send a man out to make repairs.

Mr CHURCH.—Q. You have to send a man out?

A. We have a man over the entire line, employed by the month.

Q. But you don't deduct—that when you pay him you don't deduct that from this—

A. (Intg.) We don't, it is so little.

Q. Practically Lacy & Co., who built that, are receiving $600 per month right along?

Mr. CORY.—They are paying $600 a month.

Mr. CHURCH.—But it is being applied on their indebtedness?

A. Yes, under a contract made with them. At the present time they are getting something in the neighborhood of—we are repaying the principal at the rate of, I

(Testimony of J. J. Seymour.)

think, somewhere in the neighborhood of $450 a month. The other $150 is interest charge.

Q. But the whole $600 goes to either principal or interest. Was the capital stock of the company all taken, all really issued? A. Yes.

Q. And $790,000 of it?

A. Eight hundred thousand dollars.

Q. Put down here in this statement as $790,000. Where is that other $10,000? Does the company still own that?

A. That has never been issued, that $10,000. Oh, yes, there was some stock returned to us.

Q. Well, it is practically in the hands of the company and not issued?

A. Yes. It was issued in the first place. Oh, yes, I remember. I had forgotten it momentarily.

Q. Was that taken at par?

A. It was taken as a bad debt.

Q. Seven hundred and ninety thousand dollars?

A. No, the $10,000. The other was given in payment of water rights, in the inception of the scheme.

Q. This statement you are to make will show exactly what has been done with this money, how much was realized and what was done with it? A. Yes, sir.

Q. In other words, what property you got for it?

A. Yes, sir.

Q. And what you paid for it. That is what I want to get.

(Testimony of J. J. Seymour.)

Mr. CORY.—The company didn't receive a dollar in cash, did it, for its capital stock? A. No.

Mr. CHURCH.—Q. Are the operating expenses, Mr. Seymour, the same as they have been? Have they been for this last year the same as in past years, since you have been acting as receiver?

A. Practically the same. Of course there are changes from time to time.

Q. Is the salary list the same as it was during those years practically?

A. Practically the same. There may have been an increase, something of that sort, in individual salary.

Q. The books for this year, 1900, have been balanced so that we can get at the amount?

A. I don't think the balance is struck yet. You mean for 1900?

Mr. CORY.—Yes, for the last year. There have been statements rendered every month, you know, Mr. Church.

Mr. CHURCH.—Yes, I understand but I wanted to get at it—

A. Well, it takes several days—both companies—it takes several days to strike a balance and get it out in form.

Q. Have you been increasing the works of the company during the last year, Mr. Seymour?

A. Yes, somewhat, under the direction of the Judge.

Q. How much have you expended in that way during this year?

(Testimony of J. J. Seymour.)

A. I have not got the figures with me. The Judge allowed us to issue receiver's certificates and I think we have withdrawn something like $17,000 of this and sold them at par.

Q. Have you been adding to the company's works this year?

A. My receivership began in September, fifteen months ago, sixteen months ago—

Q. September, 1899.

A. September, 1899, and since then the Court allowed us to sell receiver's certificates and purchase some transformers, $6,000 worth; and then we have expended somewhere in the neighborhood of $15,000 or $18,000 for reservoir site and in the partial construction of the dam and reservoir.

Q. Your books, of course, will show just what your expenditure has been? A. Yes, sir.

The further taking of testimony herein was here continued until 2 o'clock to-morrow, January 3, 1901.

Office of San Joaquin Electric Co.
Fresno, January 3d, 1901.

J. M. COLLIER, being called as a witness for intervenors, and being duly sworn by the Special Examiner, now testifies as follows:

Mr. CORY.—In looking over this statement of Mr. Price, we discover that he has left out the bettement account entirely. That is a very important account, all

(Testimony of J. M. Collier.)

the extension of the lines and expenses of one kind and another, amounting in one year to $15,000 or $16,000, and that was left out entirely, apparently, in his account. Mr. Collier spoke to me of it. It don't seem to be taken into account at all.

Mr. CHURCH.—It might be well to ask him something about that.

Q. Mr. Collier, you are secretary of this San Joaquin Electric Company? A. Yes, sir.

Q. How long have you been such?

A. Since its organization.

Q. And you are and have been secretary, I suppose, since the receiver was appointed, the same as before?

A. Yes, sir.

Q. Have you a copy, Mr. Collier, of a statement of the affairs of the company made by you and Mr. Seymour, signed by you and Mr. Seymour, some time about January, 1899, and addressed to or sent to the Trust Company, the complainant, or to the Municipal Investment Company, either one?

A. We have no copy, no, sir, and I don't remember sending any statement except to Mr. Coffin.

Q. You sent a statement. The statement was sent to Mr. Coffin? A. Yes, sir.

Q. Have you got a copy of that? A. No, sir.

Q. Have you any memoranda anywhere of that

A. I couldn't tell without looking over the papers. I don't think so though.

(Testimony of J. M. Collier.)

Q. I wish, if you don't know for certain, that you would look and see if you have that memoranda or could supply it, not now. You keep all the records, of course, of the company? A. Yes, sir.

Q. Have you the demand, or a demand made by the Trust Company, the complainant herein, upon the Electric Company to make payment, before this suit was commenced—payment on account of the interest?

A. A demand of the Mercantile Trust Company, I suppose?

Q. That is the complainant, you know?

A. I don't remember just now, Mr. Church. I can't answer that question, Mr. Church, except to say there is usually a notice served that interest is due but I can't recall that they served such a notice. I know it is customary.

Q. You then don't recollect receiving any notice of that kind?

A. Well, I couldn't say until I look through the files of the letters, etc.

Q. It wasn't turned over to you, a notice of that kind?

A. No, sir.

Q. And you have none then? A. No, sir.

Q. Now, Mr. Collier, you have kept the books of the company. You know or can find out from those books just what money has been received and what money paid out? A. Yes, sir.

Q. Since the organization of the company. Have you

(Testimony of J. M. Collier.)

got a statement drawn up, or would you have to look at the books to see?

A. Well, I have a statement from month to month.

Q. You have, continuous from the beginning?

A. Continuous from month to month, of the disbursements and receipts.

Q. From the beginning?

A. From the beginning, up to date. I have the statement before me.

Q. Now, perhaps, if you will turn to the month of December, 1898— A. Yes, sir.

Q. Those statements are on your books?

A. Yes, sir, I have it in the book. (Book handed to Mr. Church.) December, 1898. That is the disbursements. Those are the footings of the ledger.

Q. When did you make that?

A. I made that the 1st of December, 1898—1st of January. It was for the month of December, but it was not compiled until the 1st of January.

Q. It is meant to be for the month of December?

A. December.

Q. Are these figures the same as Mr. Price had?

A. Yes. His is a statement of that—a summary of that.

Q. Did he get his figures from this book?

A. Yes. He has access to this book. He got it from this and the original both. That is the disbursements in detail for that month, and the receipts in detail.

Q. Well, now, Mr. Collier, how much does that show

(Testimony of J. M. Collier.)

—what amount of money does it show that the Electric Company had on hand or received during that month of December, 1898?

A. Amount on hand the 1st of December was $607.13.

Q. How much did it receive in addition?

A. It received during the month $3,713.23 and a few other collections—1, 2, 50.

Q. Is that the total receipts?

A. That is the total receipts for that month. That is for current and sundries sold, lamps, etc., during the thirty days.

Q. What were the receipts for each of the months preceding during that year? Were they the same or about the same?

A. Well, they varied, of course; about the same, though. They are given in detail.

Q. If you can, get a sum total for each month.

A. Well, for November it was $5,521.97.

Q. And for October?

A. I suppose you want the actual receipts?

Q. Yes. A. For October, $1,285.36.

Q. One thousand two hundred and eighty-five dollars?

A. Yes, sir.

Q. And how many cents?

A. Thirty-six cents.

Q. Do you know the reason of the falling off there?

A. This was in '98. We run only part of that month, I think, to the best of my memory just now.

(Testimony of J. M. Collier.)

Mr. CORY.—Shortage of water, I suppose?

A. Shortage of water.

Mr. CHURCH.—Q. Anyway, that represents the total receipts for that month? A. Yes, sir.

Q. That is, the total receipts, and not the receipts after deducting anything? A. That is gross.

Q. That is gross receipts for that month?

A. Yes, sir.

Q. Go on. September?

A. One thousand dollars and eighty-eight cents.

Q. One thousand dollars and eighty-eight cents?

A. Yes, sir.

Q. That is the total receipts for September?

A. Yes, sir.

Q. Go on.

A. Two thousand seven hundred and fifty-three dollars and twelve cents for August. Now the next month, July, $3,531.44; $3,261.32 for June; $2,949.94 for May.

Q. What month was that?

A. May; $3,682.47 for April; $3,812.03 for March, and for February, $3,741.24. $3,911.22 for January.

Q. That completes the year. Now, will you let me see the disbursements right there?

A. Commences on the right side with the disbursements.

Q. Now, Mr. Collier this is a trial balance that you have put here. Are these amounts of salary continued about the same right along?

(Testimony of J. M. Collier.)

A. About the same. I might say they were more in the beginning. There was a good deal of that that was in the nature of construction.

Mr. CORY.—He is talking about the salaries.

A. Those salaries, the same.

Mr. CHURCH.—I notice in that year, in January, 1898, the amount of $800 paid to the Fresno Water Company. What was that for?

A. Paid to the water company? I suppose that was to reimburse the money we borrowed.

Q. That was simply paying up for a debt?

A. Paying up what we had borrowed.

Q. At what time had you borrowed?

A. At different times all along.

Q. For how many years?

A. Well, sir, practically up to the time it went into insolvency.

Q. What was the first year? This shows, doesn't it?

A. 1896—sometime before we got any revenue.

Q. Well, now, aside from what was realized from the sale of the bonds, does that book here show how much money was borrowed? I want to know what the indebtedness of the company had been and for what. How much was realized from the sale of the bonds or from the bonds?

A. Well, we sold $525,000 worth, at a discount of twenty per cent.

Q. That is, at eighty per cent?

(Testimony of J. M. Collier.)

A. Less $165,000 taken over.

Q. Five hundred and twenty-five thousand dollars. Does that represent the issue of bonds?

A. Yes, sir, bonds sold.

Q. Now, this $165.000, or whatever it represents, of the water company, was that in bonds transferred?

A. As I understand, that was bonds of the electric company taken over in exchange for stock of the water company.

Q. That is, in payment for the water company's property, or stock, practically? A. Yes, sir.

Q. After taking out that $165,000 of bonds, at par value, out of the $525,000 issued, you would have a certain amount. How much did you realize from the sale of it?

A. Whatever that is left, less twenty per cent.

Q. Can you give me the exact amount?

A. It was at different times, of course, that was sold. I would have to go over the entire books from the beginning up to that date.

Q. You have not anywhere a statement of that amount? A. No, sir.

Q. Now, as to the value of the property, I believe that is alleged here in this complaint to foreclose, that the property is slender and insufficient security for the payment of the indebtednes of the company, and we are disputing that. We want, therefore, as near as possible, to get at the value of this property, not only its cost, but its actual value. I don't know how we will

(Testimony of J. M. Collier.)

get at the actual value of that property without having experts testify, but we can get at the cost of it.

Mr. CORY.—Then you can find the revenues. That will determine, to a certain extent, what the value of the property is.

The WITNESS.—You mean, the value of the plant?

Mr. CORY.—Yes.

Mr. CHURCH.—Q. Now, didn't the company receive something like a quarter of a million dollars, aside from the $165,000 worth of bonds that were transferred for the water company's property or stock?

A. I would have to figure on it.

Q. You could tell very quickly by figuring, couldn't you? As I figure it, it makes about $218,000.

Mr. CORY.—Two hundred and eighty-eight thousand dollars isn't it?

Mr. CHURCH.—Yes, $288,000.

A. Yes, that is about it. I don't remember now. I figured it out yesterday.

Q. Now, I want to get at, as near as we can, what that money was used for, and what property was acquired with it, this $288,000?

A. Well, the cost of construction—the original contract with the electric company was $113,500, dynamos, plant, and stringing the wire on the pole line, reservoir site, etc.

The further taking of testimony herein was here continued until to-morrow, January 4th, 1901, at 2 o'clock P. M.

(Testimony of J. M. Collier.)

Office of San Joaquin Electric Co.,
Fresno, January 4th, 1901.

It is stipulated by the attorneys present and representing the different parties, that the further taking of evidence in this matter be continued, to be taken up on five days' notice, by either party, and that the hearing and all matters of that kind be stayed in the interim.

Office of San Joaquin Electric Co.,
Fresno, March 6th, 1901.

Pursuant to stipulation and notice last hereinbefore set forth, the above-entitled matter came on for further hearing, and the following proceedings were had and testimony taken:

J. M. COLLIER, recalled by intervenors for further examination, testifies as follows:

Mr. WORKS.—Q. You have testified that the Electric Lighting Company issued its bonds in the sum of $525,000, and that of that amount $165,000 was used in the purchase of the stock of the Fresno Water Company. Is that correct? A. Yes, sir.

Q. So far as the amount of $165,000 is concerned, those bonds were used at par, if I understand you?

A. Used as what?

Q. At par? A. Yes, sir, I think so.

Q. The balance of the $525,000 of bonds were sold at 80 cents on the dollar? A. Yes, sir.

Q. That would realize to the company $288,000, would it not?

(Testimony of J. M. Collier.)

A. Yes, sir. I suppose those figures are correct.

Q. Well, you are at liberty to figure it and see that it is correct.

Mr. CORY.—That is a mere matter of computation; no need of taking up time to do it.

Mr. WORKS.—No, not unless the witness desires. If I make any mistake I want him to correct it, because I am not much of a mathematician.

Q. If I understand you, the company expended in the construction of this work $363,900. Is that correct?

A. What date was that, Judge?

Q. That was, I suppose, up to the date of the defalcation in the interest. I don't know just when your attention was directed to, but those are the figures you give. You don't seem to fix the date here. Can you fix that date for us, Mr. Collier?

A. Those are about the figures. I notice the 1st of January, 1899, there was an indebtedness of about $355,000.

Q. I find, from the statement of resources and liabilities of the San Joaquin Electric Company, as of date December 31, 1899, the item of construction, $363,990.06. Is that a correct statement of the amount of money expended by the company up to that date?

A. Yes, sir.

Q. In construction? A. Yes, sir.

Q. Then, if I figure correctly, there would be a difference between the amount realized from your bonds and

(Testimony of J. M. Collier.)

the amount expended in construction of $75,990.06. Where did that latter sum of money come from that was used in construction?

A. I don't know as I understand you.

Q. Well, there was used in construction $75,990.06 in excess of the amount realized from the sale of your bonds. The question is, how was that additional amount made up that was used in the construction? Did you levy any assessment on your stock?

A. No, sir. That was from the receipts of the water company and electric company, and amounts we borrowed different times.

Q. Where did you borrow money from?

A. We borrowed it from the local banks and individuals.

Q. Now, on the 1st of January, 1899, what was the indebtedness of the San Joaquin Electric Company? That is the date when the default occurred, as I understand it. That would be the end of the year 1898. You can take December 31st, if that is more convenient, the close of the year. A. It was $355,532.

Q. Of what items was that indebtedness composed?

Mr. SEYMOUR.—Excuse me, Judge. He is giving the cost of construction.

Mr. WORKS.—Oh, no. I want the indebtedness. I wondered if you were that much in debt at that time.

Mr. CORY.—You might segregate it.

(Testimony of J. M. Collier.)

Mr. WORKS.—Yes, I would be glad to have you segregate it.

A. Sperry Flour Company, $6.43; Washburn Mower Manufacturing Company, $52.75; Kutner-Goldstein Company, $75.88. Salary list, due different individuals, C. G. Smith, $65; W. H. McCurdy, $75. Now, bills payable. That was notes that we had given, $14,150.

Mr. CORY.—Do you want a segregation of that?

Mr. WORKS.—No, that is not necessary.

The WITNESS.—(Continuing.) L. Shelley, $460.10, salary; T. L. Hendrickson, $65.

Mr. CORY.—Salary?

A. Yes, sir. National Carbon Company, $65.

Mr. CORY.—Better state what it is for.

A. For supplies. That was for carbons, the last one. Electrical Appliance Company, supplies, $170. General Electric Company, $6,135.66.

Mr. CORY.—What is that?

A. That was for supplies, material for construction purposes. Our interest then was unpaid, $18,375.

Mr. WORKS.—Q. Is that the interest on the bonds?

A. Yes, sir. J. N. Smith, salary, $120.75 George D. Jewett, $88.25, salary, the last two, and there was due the Fresno Water Company, $22,688.22.

Mr. CORY.—Q. Money borrowed?

A. That was money borrowed. George Anderson, salary, $50.75; Paul Austin, salary, $35; W. E. Shackle-

(Testimony of J. M. Collier.)

ford, salary, $57.35; J. J. Sweeny, salary, 243.90; J. A. Thunen, salary, $700.10; J. S. Eastwood, $188.80—

Mr. CORY.—Salary?

A. L. L. Cory, $857.90. There was actually more due him then.

Mr. WORKS.—Q. What was that for?

Mr. CORY.—Services for the corporation, attorney's fees.

The WITNESS.—Pelton Water Wheel Company, $653.41; F. Serpas, salary, $65; F. Seymour, salary, $570.85; H. G. Lacy Company, $23.75. That was supplies. J. E. Sutherland, salary, $65; California Electrical Works, supplies, 411.40; G. W. Hazelton, salary, $73.55; Robling Sons Company, supplies, $99.52. That is the total.

Mr. WORKS.—I wish you would make a statement of these items of indebtedness, segregating all items that go into construction and items that would be included in your operating expenses, including all salaries and amounts paid for other services in operating the plant, and file it as part of your testimony, as Intervenors' Exhibit "E." You can do that, Mr. Collier, at your leisure. What I want to show is just how much was due then for construction, and how much for ordinary operating expenses. You can easily segregate them, and give your totals of the two items.

The WITNESS.—The interest would not come in that, the bond interest?

(Testimony of J. M. Collier.)

Mr. WORKS.—No, that is a separate item altogether Of course, we all know what that is.

The WITNESS.—Well, the amount due these different parties, for instance, the water company, would that be construction?

Mr. CORY.—Money borrowed for construction work.

Mr. WORKS.—If you know what that was borrowed for; if for construction, it would be included in that item. You will have to determine that as nearly as you can for yourself. If you borrowed the money to go into construction, it should go into that class.

Q. At the time this money was borrowed from the Fresno Water Company, the company was practically owned by the San Joaquin Electric Company, was it not?

A. Yes, sir.

Q. And the Fresno Water Company was earning a net surplus of revenue at that time?

A. The water company was, yes, sir. Excuse me. You say it was earning a net surplus? I don't know as I understand.

Mr. CORY.—It was a paying proposition, is what he means.

Mr. WORKS.—I will come at that a little more particularly. We will get at the facts, if we can, Mr. Collier. I see by this statement of the earnings and expenditures of the water company that for the year 1897 its net earnings, not including interest on its bonds, amounted to $22,411, 94.

(Testimony of J. M. Collier.)

A. The water company?

Q. I am speaking of the water company now, yes, sir. The interest on its bonds for the same year amounted to $19,500, leaving a surplus for 1897 of $2,911.94. That is a correct statement of the condition of the accounts for that year, is it?

A. I couldn't say, not having the figures before me.

Q. 1897 I am speaking of now.

A. That will be January 1st, 1897?

Q. No, that will be January 1st, 1898, for the year 1897, ending the 31st of December.

A. I have, total receipts for 1897, $47,601.20, from water sales, etc., and for sale of real estate, $3,500 additional.

Q. I wish you would look at Intervenors' Exhibit "A" and state whether that is a correct statement taken from your books handing paper to witness).

Mr. CORY.—Is this a copy you made?

Mr. WORKS.—Yes, a copy of it. I am only using that for convenience, being so much handier, being in typewriting He can look at the original. You can take the original and testify from that, if there is any question about it being a correct copy.

Mr. SEYMOUR.—These are not Collier's make-up.

Mr. WORKS.—They are made up by Price, but I think Mr. Collier testified when on the stand before that he had examined them and they were correct.

(Testimony of J. M. Collier.)

Mr. SEYMOUR.—Substantially. There seems to have been a little discrepancy, if I remember right. (Intervenors' Exhibits "A," "B," "C" and "D" are here handed to the witness.)

Mr. CORY.—You looked those over once, didn't you?

A. I don't remember now.

Mr. CORY.—I handed them to you and asked you to verify them, and you came to the office and said there was some discrepancy.

Mr. WORKS.—Yes, the testimony shows that. I want you to examine Exhibit "A," as to the water company.

A. Substantially the same.

Mr. SEYMOUR.—A few little discrepancies.

Mr. WORKS.—Q. What do those discrepancies amount to in dollars and cents, any material amount?

A. I have not the statement made in the same form, but, I think, practically the same.

Q. Then, according to that statement, the net surplus revenue of the Fresno Water Company for that year was $2,911.94? That is substantially correct, is it?

A. Yes, sir; that is substantially correct.

Q. Then, taking the year 1898, the net surplus is shown to be $3,270.62, after payment of interest. Is that correct?

A. In this statement we just passed from there is quite an item of construction. Of course, this money was paid out again, in construction.

(Testimony of J. M. Collier.)

Q. We will come to that directly. That was your net surplus for that year? A. Yes, sir.

Q. Whatever it may have been used for subsequently. Then, for the year 1899 the net surplus is $7,926.58?

A. 1898 you want now?

Q. 1899 I am speaking of now. For 1898 it was $3,270.62?

A. That is the net earnings as shown by your statement, but my statement varies from that a little. It is a little differently gotten up.

Q. Well, does it vary materially in amount, is the question?

A. There seems to be a discrepancy in receipts.

Q. How much of a discrepancy?

A. Two hundred and twenty-nine dollars and ninety-seven cents.

Mr. SEYMOUR.- -Less.

Mr. WORKS.—Q. That is to say, your receipts were less, that much?

Mr. SEYMOUR.—No.

Mr. WORKS.—Q. Were more that much?

A. Yes, sir.

Q. How much, $229.97?

Mr. SEYMOUR.—This seems to be in a little different form, Judge, here.

The WITNESS.—His total expenditures, aside from bond interest, is summed up here $21,199.61. I sum it up $22,536.73—a difference of $1,137.12.

(Testimony of J. M. Collier.)

Mr. WORKS.—Q. That difference would be which way?

A. He lacks that much of having enough on his statement.

Q. Then, will you give me what would be the exact net earnings, according to your books, for those three years, '97, '98 and '99? You can just take those general footings, with the discrepancies that you discover. The figures, according to my figures, are $14,334.11, but those discrepancies might change it.

A. I have no statement showing earnings—simply statement of disbursements and receipts. What years are those?

Q. 1897, 1898 and 1899, covered by your exhibit. Those footings will give you the amount, taking off the discrepancies, whichever way it may be. You say they are not exactly correct. If it were not for that, we could use those footings. What would that give as the totals for the three years?

A. For the three years it would amount to $12,542.05.

Q. That, then, would be very nearly the amount that you borrowed for the benefit of the Electric Company, as you have already stated?

A. At that time the Electric Company owed us $22,000.

Q. At what date? A. December 31, 1898.

Q. If this was the net earnings of the Water Company and it belonged, in effect, to the Electric Company,

(Testimony of J. M. Collier.)

why were you borrowing money from the Water Company and paying interest upon it?

A. I don't understand your query, exactly. We were borrowing from the Water Company at different times to keep up the indebtedness, or to pay interest and other debts of the Electric Company.

Q. But why were you borrowing money from the Water Company and paying interest on that money when it had that much of net earnings after paying all of its liabilities, and that money belonged to the Electric Company?

A. You mean the earnings of the Water Company belonged to the Electric Company?

Q. Yes, you so stated, that it owned the Fresno Water Company.

A. Well, their accounts were kept separately.

Q. Certainly. But why should you be paying interest on the money that belonged to you?

A. I don't understand.

Q. Why was it, if there were net earnings to that extent in the Water Company, that that amount was not credited upon the indebtedness due from the Electric Company to the Water Company?

A. Due from the Electric Company to the Water Company? I admit that I don't understand the question.

Q. What reason was there why this money that came in as net revenues of the Water Company could not have

(Testimony of J. M. Collier.)

been applied upon the interest that was due upon the bonds of the Electric Company?

A. Well, as I see it now, we paid it out for construction purposes.

Q. Construction purposes of what company?

A. For the Electric Company.

Q. Then you did use that money that you got from the Fresno Water Company, did you, for the Electric Company? A. Yes, sir, every cent of it.

Q. And you used it in construction?

A. Yes, sir.

Q. When did you make your application of it in that way? A. Why did I?

Q. When?

A. Well, at different times, whenever it was available.

Q. Well, why—if you appropriated the money in that way that actually belonged to the Electric Company—why do you carry it as indebtedness of the Electric Company to the Water Company?

A. Simply because we kept the two companies' accounts separate and distinct.

Q. That is the only reason? A. Yes, sir.

Q. They were both owned by the same company?

A. Yes, sir.

Q. And it was simply for the purpose of keeping the books and accounts separate for the two companies?

A. Yes, sir. When we borrowed from one we credited the other.

(Testimony of J. M. Collier.)

Q. But you used the money indiscriminately, did you not, for the benefit of the owners of both?

A. In common, yes.

Q. Then, as a matter of fact, the amount of net earnings of the Fresno Water Company was so much net earnings for the Electric Company, was it not?

A. Yes, sir, or for both companies.

Q. Treating it that way, as belonging to the same person. Now, going to the account of the San Joaquin Electric Company, Exhibit "B" shows that the net earnings of the San Joaquin Electric Company, not counting the interest upon its bonds, was $10,878.80 for 1897. Is that correct?

A. Well, now, in answer to that, Judge, this statement, as per Exhibit "B," we figured out that amount of net earnings. My books I have not in that form. I can tell you, however, that the gross receipts were $41,394.57.

Q. Did you compare this statement of his with your books since you testified before? A. No, sir.

Q. You were requested to do that, were you not?

A. I don't know as I was. If I was, it slipped my memory.

Q. Taking this exhibit to be correct, the net surplus of the company for those three years would be as follows: For 1897, $10,878.80; for the year 1898, $14,173.49; and for the year 1899, $29,957.28, which would make a total of 55,009.57 for those three years. What has been done with that surplus?

(Testimony of J. M. Collier.)

A. That has been expended in construction.

Q. When? A. During those three years.

Q. I understand that this account includes your construction expense, and your net earnings are over and above all expenses paid, including your construction, else it would not be a net earning.

A. I do not think his statement here is correct. I notice that I have during the year 1897 charged to interest paid out $16,131, and Mr. Price's statement is only $1,057.

Q. Well, how much interest did you pay during that year? A. We paid $16,131.01.

Q. When? A. During the year 1897.

Q. What time in the year 1897?

A. I would have to look over the ledger.

Q. Well, wait a moment. As I understand this account, it does not take into account at all the interest upon the bonds, either upon the credit or debit side. Except as to that the statement would be correct, would it not?

A. Well, I don't like to say, unless I had a statement gotten up by myself.

Q. Well, assuming this statement to be correct, that would be the condition of the account? There would be net earnings of $10,878.80, excluding from the account the question of interest uopn the bonds?

A. Yes, sir.

Q. What is this item of interest, $1,057.72? That

(Testimony of J. M. Collier.)

was not interest upon the bonds, was it? It was for other money you had borrowed?

A. That must have been—in his statement it must have been for interest due on moneys borrowed from bank.

Q. Why were you paying interest upon money borrowed from the bank and allowing your interest to default upon your bonds when you had this net earning of $10,878.80?

A. The money, instead of being applied to the interest, was applied to construction.

Q. Well, but—Mr. Collier—this account shows that, after paying all your items of expenses, including, necessarily, your construction, you had a surplus.

A. We never had a surplus, at any time.

Q. Sure about that, are you? A. Yes, sir.

Q. Taking the year 1898, this account shows a surplus of $14,173.49. What did you do with that?

A. That was paid out in the same way.

Q. For construction? A. Yes, sir.

Q. The following year?

A. The following year, or the year as—

Q. If it was for that year it would be in your account, as one of your expenditures? A. Sir?

Q. If it was paid out during that year it would be in your account as part of the expenditures?

A. Yes, sir.

Q. Then it must have been carried over and used for that purpose in the following year?

(Testimony of J. M. Collier.)

A. It was expended as it accumulated.

Q. Well, Mr. Collier, this statement of your net account must necessarily be the net amount on hand at the end of that year, isn't it?

A. Amount of cash on hand?

Q. No, not necessarily cash on hand, but the difference between your expenditures and your earnings?

A. Yes, sir, but it was represented in other ways, in improvements that we had put in.

Q. I understand this covers the amount of expenditures for improvements, doesn't it, up to that time? You don't mean to tell me your books showing amount of your expenditures and earnings during the year and your summing up of your books leaves out the important item of construction, do you? A. No, sir.

Q. Then it is included, and these net earnings are over and above your construction account as well as your operating expenses?

A. As shown by his statement, it is.

Q. Well, if you find that your statement differs from his, I will ask you to furnish me a statement of your account, and attach it to your deposition. Then, for the year 1899, your net earnings appear by this exhibit to be $29,957.28? A. Yes, sir.

Q. Then you had for those three years a net earning of over $55,000, did you not?

A. That is the amount, summed up, of those three items.

Q. Now, can you tell me why it was that during that

(Testimony of J. M. Collier.)

time, and with those net earnings, your company was borrowing money from other people and paying interest upon it, and letting interest upon those bonds go by default?

Mr. CORY.—You are now referring to Mr. Price's statements, not Mr. Collier's?

Mr. WORKS.—Yes, sir. I am asking him to correct it, if it is not correct.

A. As I stated before, Judge, we never had any surplus on hand, and my statement would not show any at all.

Q. How can you account for the discrepancy in Mr. Price's statement of the condition of your books, taken from your books, then?

A. It is a different method we have of compiling the accounts.

Q. Did you know when Mr. Price was examining your books? A. Yes, sir, he had free access—

Q. You exhibited them to him? A. Yes, sir.

Q. Is any item left out of this account that appears upon your books, your summing up of the books for the year? If there is, I wish you would point it out.

A. I couldn't say. It is compiled in a different form.

Q. Well, I will have to ask you to compare it, and if there is any item that is omitted I would like to have it, either on one side or the other of the account.

Mr. CORY.—I will state, Judge, we did examine this, as I remember it—I thought Mr. Collier did, too—and

(Testimony of J. M. Collier.)

we found no charge for permanent improvements, which would have made a difference between the books and Mr. Price's statement, and he couldn't remember why it was left out.

Mr. WORKS.—If there is anything that is omitted from this account, on either side, I want to know what that is.

The WITNESS.—Yes.

Mr. WORKS.—And what it amounts to.

Mr. CORY.—If Mr. Collier has not examined it, I presume he can't do it in a minute; but if you can do it, Mr. Collier, and show where the discrepancy exists—

Mr. WORKS.—If there is any. We might read off Mr. Collier's account of precisely the same date, at the end of each year, and we will have it.

The WITNESS.—I can do that.

Mr. CORY.—Or we can furnish it to you.

Mr. WORKS.—I am sorry it has not been done.

Q. When you were on the stand before, Mr. Collier, it was stated, either by you or Mr. Cory, that this account did not refer to or take in account the matter of betterments. What do you mean by "betterments"?

A. Well, permanent improvements, extension of the plant.

Q. Well, that would be part of your construction account, would it not?

(Testimony of J. M. Collier.)

A. Yes, sir. In 1897 the plant was far from being finished.

Q. You have been adding to it, I presume, each year?

A. All the time, monthly.

Q. Where and how do you carry that account of construction, of betterments?

A. Charged it up to construction account.

Q. And when you make up your summary of your books at the end of the year, as you seem to have done here, that is carried into that summary, isn't it?

A. Yes, sir, it is carried in.

Q. Well, then, if this statement includes what appears upon your books at the end of each year, it would necessarily include what you call betterments or construction, would it not? Can you turn to your construction account of 1897? A. Yes, sir.

Q. What is the total of your expenditures for construction for that year?

A. I presume there is some interest in that—difference on the sale of bonds.

Q. That total amount you have there would include the amount that is applied from the sale of your bonds? That is the first year you did business?

A. 1897, yes, sir, for the full year.

Q. Of course that was the year when your main construction was done and paid for out of the sale of your bonds? A. Yes, sir.

Q. That would not aid us very much then.

A. $89,115.95. I can't say without I go into the ac-

(Testimony of J. M. Collier.)

count whether that represents the correct amount expended on construction or not. That is the footing of construction account December 31 to December 31 the following year.

Q. Well, according to your previous statement, your entire expenditure for construction up to December 31, 1898, would be $75,000 over and above the amount realized from your bonds? A. That is, for 1898?

Q. Up to 1898, but a part of that you say your borrowed, you are not able to tell us how much?

A. I can tell you by going over.

Q. Well, we haven't time now to undertake to figure it out and it wouldn't be a very good time for you to stop now to do it. You would want to take your time to do it, I suppose?

A. I am very sorry I didn't go in and make a statement.

Q. Yes, so am I.

A. I could have had it to compare with Mr. Price's statement.

Q. Could you take these statements of Mr. Price and run over them between this and 2 o'clock and ascertain whether there are any omissions and if so what they are?

Mr. CORY.—He couldn't certainly, do that.

The WITNESS.—Not very well. For my satisfaction, I would like to make a statement for the three years, 1897, 1898, and 1899.

(Testimony of J. M. Collier.)

Mr. CORY.—You could go over Mr. Price's statement and see what has been left out and of what it consists, couldn't you?

Mr. WORKS.—These are simply the summings up of the three years.

Mr. CORY.—I understand you have already made statements for those three years?

A. Yes, sir, I have a form of statement here.

Mr. SEYMOUR.—It differs from Mr. Price's.

Mr. WORKS.—As I understand it, the difference between the accounts as made here and yours is that he sums them up under different headings, salaries, for instance, supplies, expense, repairs, power-house expenses, etc., while yours is not segregated in that way?

A. No, sir; it is in quite a different form.

Q. Well, passing that for the present, according to this statement the net earnings of the Electric Company have increased each year from the beginning, it appearing that for 1897 the net earnings were $10,878.80, for 1898, $14,173.49, and for 1899, $29,957.28. Has that increase in the earning capacity of the company continued since that time?

A. Yes, sir. I can give you the gross figures.

Q. You mean, of the net earnings?

A. Yes, sir, for 1900.

Mr. CORY.—I suppose that is assuming there were net earnings?

The WITNESS.—I mean gross earnings.

(Testimony of J. M. Collier.)

Mr. WORKS.—I have the figures for 1899.

The WITNESS.—Balance on hand January 1st, 1900, $248.58.

Mr. WORKS.—Q. What do your gross earnings show for that year as compared with the others, in the gross earnings, as I understand, for 1897 being $41,520.84; for 1898, $38,105.90; and for 1899, $54,415.74. Now what were the gross earnings for the year 1900?

A. Fifty-four thousand dollars for 1899?

Q. For 1899, according to this statement.

Mr. CORY.—Mr. Price's statement.

Mr. WORKS.—Yes, taking his statement, $54,415.74.

A. Fifty-two thousand three hundred and twenty-seven dollars and fifteen cents. I thought there was an increase.

Mr. CORY.—Q. What are you speaking of now, for 1900? A. Yes, sir.

Mr. WORKS.—Q. Do you mean to say there was a falling off in the gross revenues for 1900 as compared with the others? Are you right about that?

A. Well, no, sir. The actual receipts for 1899 was $47,952.71. That includes current sold, lamps and material.

Q. This account shows for 1899 receipts current $54,057.46. Do you know where that item came from? I am referring now to Mr. Price's statement for 1899.

A. No, sir.

(Testimony of J. M. Collier.)

Q. Exhibit "B."

A. Current sold and power was $44,049.11—for lamps and materials, $3,903.10, making a total of $47,952.21.

Q. When was that summary of the accounts made up?

A. At the end of the year 1899, December 31, 1899.

Q. Immediately at the close of the year?

A. Yes, sir.

Q. Then your gross receipts for 1900 was how much?

A. The gross receipts for current—this is for 1900—gross receipts for current sold was $50,384.70. That is the actual cash receipts. The merchandise sales, lamps, materials, $1,942.45, making a total of $52,327.15.

Q. What were your expenses for that year?

A. Expenses for repairs salaries, carbons and expenses, that is general expenses, taxes, supplies and interest on small loans, was $30,285.86.

Q. Leaving a surplus of how much?

A. I have not figured out that.

Mr. CORY.—About $22,000.

The WITNESS.—The supplies purchased was three thousand—

Mr. WORKS.—Take your totals and subtract one from the other. That will give you the net surplus.

Mr. CORY.—That item of supplies, he has to include that in his disbursements.

Mr. WORKS.—Whatever is a part of the expenses.

A. Actual cash balance was—

(Testimony of J. M. Collier.)

Q. I am not talking about cash balance. I want you to subtract your expenses. You have the total there. You gave me the total. A. Yes, sir.

Q. Well, now, subtract one from the other and give me the difference.

A. What will we do about construction?

Q. Well, answer my question first, and then we will come to construction.

A. Gross receipts, with balance on hand left from last year was $53,342.38; disbursements for salaries, repairs, carbons, taxes, arc supplies and interest was $30,285.86, for merchandise supplies, $3,147.18, making a total of $33,433.04, and a surplus of $19,909.38.

Q. Now, you have mentioned the subject of construction account. What does your construction account show for 1900?

A. Construction account shows little extensions around town and different points here, about $2,237.18; water storage construction, $17,325.73; and for water storage, again, $6,000. That is payment on water contract, making a total of $25,562.91.

Q. What is that water contract, and who is it with?

A. That is with—it was some property we had to purchase up there to protect the water supply.

Q. Well, that is a part of the property of the company then that has been purchased?

A. Yes, sir.

Q. Which has added that much to its value?

A. Yes, sir, being purchased.

(Testimony of J. M. Collier.)

Q. And for that purpose you have asked the court to issue receiver's certificates, have you not, to use in expenditures of that kind?

Mr. CORY.—Not on that particular item.

The WITNESS.—More particularly water storage.

Mr. WORKS.—Q. It is included in water storage?

A. The reservoir site, dam, etc.

Q. Well, that is property that you purchased for the benefit of the company and adds to its value?

A. Yes, sir.

Q. About what amount have you expended for that purpose? A. The water storage?

Q. Yes, sir. A. We have expended about—

Mr. CORY.—You mean during that year?

Mr. WORKS.—Yes, I mean during that year.

A. Seventeen thousand three hundred and twenty-five dollars and seventy-three cents.

Mr. WORKS.—Q. Now, will you tell me what sum in gross this company has expended for betterments and extensions of its plant, including this water storage and the other things you have mentioned, since this foreclosure suit was brought.

Mr. CORY.—The receiver was appointed the very day the suit was commenced.

Mr. SEYMOUR.—At that time he opened an entirely new set of books.

Mr. WORKS.—That is all right.

A. To the 1st of February we spent $7,146.48, that

(Testimony of J. M. Collier.)

is, for general construction, and for the reservoir and water storage, $19,510.31.

Q. That would be a total of—

A. That would be a total of $26,656.79.

Q. What is the condition now of those improvements that have been made to the system? Are they completed or in course of completion?

A. I couldn't answer that question.

Mr. WORKS.—We will have to ask the engineer about that. I don't see that I can go on, satisfactorily, with Mr. Collier without his accounts in some sort of shape. I think we will relieve him for the present, and if he can't get this in shape by 2 we will have to wait a little longer, I suppose.

The WITNESS.—That is, from the books of both companies, for three years?

Mr. WORKS.—Yes, but the water company is not so material. There does not seem to be much discrepancy between you as to the water company. What I want, particularly, is the electric company. Mr. Cory may desire to have you go over the other, if there is anything wrong about that—I don't know.

A. I might give you a comparative statement from the receipts for the past few months.

Mr. WORKS.—Yes, we would like to have that.

Mr. CORY.—You better go over Mr. Price's statement and endeavor to compare it with your own and see how

(Testimony of J. J. Seymour.)

they differ, and if they differ in any particular items, what the items are and how much they differ.

Mr. SEYMOUR.—At any rate, he can give his totals, if it is so hopelessly intertwined that he can't do more.

Mr. WORKS.—We would like to have the specific items not included in Mr. Price's statement.

J. J. SEYMOUR, recalled for intervenors, testifies as follows:

Mr. WORKS.—Q. At what date did you become the receiver of this company, Mr. Seymour?

A. It was sometime in August, wasn't it, 1899, I think.

Q. The record will fix that date, if you don't remember it. At what date did the company commence to do business? A. The Electric Company?

Q. Yes. A. It was incorporated April 2d, 1895.

Q. Commenced business immediately after that?

A. Yes, sir.

Q. When was the Fresno Water Company incorporated?

A. That was a good many years ago, away back.

Q. When did the Electric Company become the owner of its stock?

A. It was some time after the incorporation of the Electric Company, within a few months.

Q. What is the connection of these two companies, if any, in the direction of their business?

(Testimony of J. J. Seymour.)

A. Well, they practically—they have the same offices and partially the same officers and employees.

Q. Well, is there any connection between them in their business. I am not speaking now about the manner in which it is conducted, but does the water company, for example, furnish any water power, or anything of that kind, to the electric company, or is there any connecting link between them in a business way?

A. The water company is supplied with current for the pumping of water by the electric company, under a contract.

Q. Is there any other connection between them?

A. The electric company—do you want this question of stock of the water company—

Q. No. We have that already. You have testified that the electric company owns all the stock, practically, as I understand. I am trying to get at the business connection in the direction of their business. You say that the electric company furnishes current to the water company, in pumping the water? A. Yes, sir.

Q. Is there any other way in which they are connected in a business way?

Mr. CORY.—They occupy the same offices.

Mr. WORKS.—He has testified to that.

Mr. CORY.—And the power-house has the same sub-station.

The WITNESS.—The sub-station is adjoining, on the same plat of ground. Is that in the scope of your inquiry?

(Testimony of J. J. Seymour.)

Mr. WORKS.—Q. They are practically operated by the same persons, and you simply keep their business and their accounts separate and distinct?

A. Yes.

Q. When there is any surplus earned by the Fresno Water Company, what is done with that money?

A. Well, practically, the way we did, the electric company borrowed it from the water company. That is the way the books will show.

Q. It was not declared as dividends, but you simply used the money, and your books show that you borrowed it from the water company? A. Yes, sir.

Q. Was any interest paid on it? A. No.

Q. Then, as a matter of fact, the showing of indebtedness here to the water company is really a fictitious indebtedness, in effect?

A. Well, no, because the water company, having the better outside reputation, occasionally we borrowed money so that the indebtedness of the water company at stated times would be really the indebtedness of the electric company.

Q. You mean you used the property and the credit of the water company to borrow money for the benefit of the electric company? Is that it? A. Yes.

Q. Is that one of the reasons for keeping the two separate and distinct corporations?

A. No. They were separate corporations, and for the first few months all the stock of the water company was not absorbed by the electric company.

(Testimony of J. J. Seymour.)

Q. Did you have any conference with the bond-holders, or the representatives of the bondholders in view of your inability to meet the interest January, 1899.

A. Up to a certain period we were in business connection with the Municipal Investment Company of Chicago, a concern that has become insolvent and gone out of business since. Up to the time of the termination of that relationship with them our connection with the bondholders was largely through them, and occasionally bondholders would come in. or representatives of them, and investigate the books, from time to time. We had a procession of them in here, you might say, but after that time the only communication we had was after we had defaulted on the first payment of interest on the bonds, in 1899, I think it was. I think it was sometime about March or April Mr. Street came here with letters, representing that he represented a majority of the bondholders, and wanted to look at our books, investigate the state of the affairs, and he did so. That was the only representative of the bondholders that I remember of our seeing.

Q. To what do you attribute your inability to meet your obligation for the interest at that time?

A. A short answer would be, lack of funds, of course.

Q. Yes, but there were some reasons for a lack of funds. I would like you to explain what you understand to be the difficulty.

A. As I stated before, we were in business relationship with the Municipal Investment Company, of Chica-

(Testimony of J. J. Seymour.)

go, who contracted with us to take bonds of us at eighty cents on the dollar. Well, they fell down on their contract with us before the plant was completed, and from that time on we were, simply, with an unfinished plant on hand, with large debts coming in from all sides. We were simply at our wits ends what to do, so we did the best we could all the time and were overwhelmed with debts all the time. We made provision as soon as we could to pay interest on our bonds, in addition to our other perplexities. That, of course, you might say, was made out of the sale of bonds, up to a certain time.

Q. You did sell your bonds, at the same price the Municipal Investment Company obligated themselves to pay?

A. No, we never sold any except to them.

Q. You sold the bonds that have been mentioned here, which was more than sufficient to pay for your construction work? A. No, we did not.

Q. Well, the figures here show that you sold your bonds, over and above the amount that was used in purchasing the stock of the water company, amounting to $288,000, in round numbers? That is correct, isn't it?

A. Well, we sold them—

Q. Well, answer my question, whether that is a correct statement of the amount that you realized?

A. No, it is not a correct statement.

Q. Well, what did you realize from them, then?

A. Well, I will have to make an explanation. We sold them to the Municipal Investment Company. They

(Testimony of J. J. Seymour.)

agreed to take over certain indebtedness from the General Electric Company, that is, owing by us to the General Electric Company, amounting to $113,500. That was the first purchase price of the plant. Well, the General Electric Company at first took their notes for that amount, and we surrendered the bonds amounting to about—$142,000 of the bonds were placed as collateral for that $113,500. Well, the General Electric Company retained a lien on the property, however—

Mr. CORY.—Q. You mean, on the plant they were putting in?

A. Yes, on the plant that they were putting in. Well, the Municipal Investment Company reduced that indebtedness to something like $75,000, to that amount, and they had bonds proportionately, but at the time they failed there was still due about 75 or 80 thousand dollars on that original contract and the bonds were in the hands of the General Electric Company to the extent of about a hundred thousand dollars. Those bonds were never sold, really, to them. On the books they are shown as sold.

Q. What amount of bonds would that be?

A. About $100,000—$98,000 par value.

Q. Do you know where those bonds are? Are they still in the hands of the General Electric Company?

A No. I was told—I have no means of knowing—I was told that the representative of the bondholders purchased that account and took up the bonds, and they are now in his hands.

(Testimony of J. J. Seymour.)

Q. What do you mean by "the representative of the bondholders"?

A. Mr. Street, C. F. Street. I have no means, personally, of knowing that.

Q. Then, as you understand it, the debt of the company to the General Electric Company was paid?

A. Was paid by somebody, yes, sir.

Mr. CORY.—Did the shortage of water have anything to do with this?

Mr. WORKS.—That is what I am about to get at.

A. When they fell down we were at sea, I was going to say. Our plant was incomplete. We couldn't furnish current to the consumers unless we made additional improvements, additional betterments, so that we were crowded on that account. Then the dry year came along and we had to shut down several months, and that also crippled us.

Q. If the dry year that you speak of had been an ordinary year and in the condition in which you found yourselves, you would have been able to have met this interest, would you not?

A. Well, I am not prepared to state that.

Q. Well, what is your judgment about it?

A. We would have had a much better chance. We would have probably gotten credit so as to have borrowed money to proceed, but we probably couldn't have gotten it out of the direct revenues.

(Testimony of J. J. Seymour.)

Q. Would it have lacked very much of meeting the obligations of the company if you had had an ordinary year, such as, for example, we have this year?

A. We possibly would have pulled through.

Q. Did you explain that situation to Mr. Street?

A. Yes, we explained fully the entire position of affairs here, but we told him as far as we could see, in view of the condition of affairs, that we saw no means of avoiding a six months' default. In addition to our other troubles, we had a lot of floating indebtedness that I had personally made myself liable for, loans made on my personal assurance that they would be repaid.

Q. Have those been taken up since?

A. Yes, sir.

Q. All of those? A. Yes, sir.

Q. When was the last of those paid?

A. They were generally paid before the six months' default was made.

Q. You cleaned up all of those before the default in your interest?

A. The six months, yes, sir. There was some—I don't remember—some $10,000, probably, of that nature. The money was borrowed to pay the preceding six months' interest.

Q. What is the condition of the company now, at this present moment, with respect to its ability to earn revenues sufficient to meet the interest upon its bonds and pay its operating expenses?

A. I think it would be able to carry on its business.

(Testimony of J. J. Seymour.)

Q. And be able to use some of its revenues to meet the back interest, would it not? A. Yes.

Q. What is it earning a month at the present time?

A. Bring that bank-book. That will give it, in round numbers.

Mr. CORY.—Last month's statement would give it.

Mr. WORKS.—Q. But for the dry year you would have been able to meet these obligations in the end?

A. At the time we thought that were it not for the dry year we would have pulled through and eventually come out all right.

Q. Don't you feel the same way now, Mr. Seymour?

A. Yes.

Q. But for the dry year you would have been able to meet your obligations? A. Yes.

Q. And isn't it a fact, in your judgment, now, that within a reasonable time as receiver of this company you can earn enough money to pay this back interest and still keep your company going? A. I think so.

Mr. CORY.—That dry year was something unusual, never had been heard of before?

A. Of course, Judge Works comes from the southern part of the State and understands what a dry year means.

Mr. WORKS.—Yes, thoroughly.

The WITNESS.—We had water to drink here all the time, Judge. That bank-book would have answered that other question.

(Testimony of J. J. Seymour.)

Mr. WORKS.—What I want is to have it in round numbers.

A. The gross receipts for the last five months ran about as follows: October, 1900, the monthly gross revenue was $3,553.32, November, $6,290.33. In that month we first began to make an increase in our rates, and that month also includes some back indebtedness that was paid up, like city warrants and that sort of thing, but December will show more clearly the increase. December shows $5,374.23. January, $5,488.93. February, $5,817.60. Now, this is gross revenue. Now in addition to that is the Hanford extension, which is paying six hundred dollars a month, gross, but is applied on the back indebtedness, you know.

Mr. CORY.—Q. In addition to that isn't there $500 from the water company?

A. In addition to that there is $600 a month from the water company.

Q. Five hundred dollars, isn't it?

A. Six hundred dollars. It was increased last year. For last month we would have gotten in a gross revenue of $7,000. For the month before, about $6,700.

Q. Then, according to those figures, it would be a reasonable estimate to say that your gross revenue for this coming year will run at least $70,000?

A. Gross revenues would be about $80,000.

Q. Eighty thousand dollars, and what are your expenditures for your operating expenses, in round numbers?

(Testimony of J. J. Seymour.)

A. They are practically what they were back two or three years ago.

Q. That would be about how much?

A. There would be an increase, because with the bettering times, etc., the increase in the salaries had to be corresponding with other business.

Q. What would it be in gross per month?

A. I would not care to answer that offhand.

Mr. CORY.—Well, you can ascertain in a moment.

Mr. WORKS.—Yes, as near as you can.

A. For last year the salaries, repairs, carbons, expense, taxes, arc supplies, interest—

Q. That is, the interest not including the interest on the bonds? A. Yes, about $30,000.

Q. For the year? A. Yes, sir.

Q. How do you think that would compare with the necessary expenditures for this year?

A. Well, there are sundry—merchandise, lamps, etc. well, say about $32,000 would be practically about what they are this year. Of course, there is always a certain amount of construction accounts that have to go in.

Q. Yes, but that adds to your security all the time. Now, with respect to this Hanford extension, as I understand it, that extension was constructed by Lacy Brothers and the revenues derived from it are to be applied to the amount expended by them, and that has been done?

A. Yes.

Q. And there has been a surplus paid, that is a sur-

(Testimony of J. J. Seymour.)

plus over and above the interest, applied to the principal of that debt since that time? A. Yes, sir.

Q. To what amount has that indebtedness been reduced at the present time? What I want to get at is the amount due at this time?

A. That amounts to something like $15,000 at present. The books don't show precisely.

Q. What was the total amount in the beginning?

A. Twenty-six or twenty-eight thousand dollars.

Mr. EASTWOOD.—Thirty-six?

The WITNESS.—That included a lot of other things.

Mr. WORKS.—Q. What is the condition of that extension, as to whether there is any increase of earning capacity in that, or does it remain about the same?

A. They were to pay a minimum amount and we have not exceeded the minimum amount up to the present time, although we expect to do so before long.

Q. Anyhow, under existing conditions, that indebtedness will be paid, you think—

A. Inside of three years.

Q. At the rate of about $450 a month?

A. Yes, it will be paid inside of three years.

Q. What additions have been made to the plant of the company since you became receiver?

A. The purchase of lands and the partial construction of the dam for the reservoir site.

Q. What was the occasion and necessity for that, Mr. Seymour? A. The shortage of water.

(Testimony of J. J. Seymour.)

Q. The experience you had during this extreme dry year showed it was necessary to provide for the storage of water? A. Yes, sir.

Q. And these expenditures have been made for that purpose and for the betterment of the plant?

A. Yes, the Judge has granted us permission to purchase an additional unit at the power-house by which we increase the capacity of the plant one-third. That machinery has been ordered.

Q. Where do you get your funds to make those additions and expenditures?

A. He allowed us to issue receiver's certificates in the matter of the reservoir construction, but provision is made for the payment of the cost of the increase in the plant from the revenues of the company.

Q. You think you will be able to do that out of the revenues you receive? A. Yes, sir.

Q. When you make those additions to the plant, without reference to the reservoir site, that will add to your capacity about one-third? A. One-third, yes.

Q. What will be the probable effect of that increase upon your revenues?

A. It will be very marked, because all the additional revenue we get will be net.

Q. What assurance have you of the increase in your business in case of an increase in your capacity? That is to say, have you any assurance of the patrons for that additional power?

(Testimony of J. J. Seymour.)

A. The assurance we have is, we are already loaded to our utmost capacity and are practically putting people off, refusing to allow them to—

Q. Is it your judgment with this increase of capacity you can increase your revenues one-third?

A. Well, it will take time.

Q. Of course, but eventually?

A. We will load up within a few years after the plant is added, within a year or so.

Q. And how much will that additional capacity probably add to your expenses of operation?

A. It won't add anything beyond the interest on the cost.

Q. You can handle that additional force with the employees you have now? A. Yes, sir.

Q. Without adding to your expenses for employees, salaries and the like? A. Yes.

Q. Has any report been made by you as receiver embodying these changes in the condition of the system and its probable ability to pay its way out, to the representatives of the bondholders?

A. We send them monthly statements of receipts and expenditures.

Q. Have you gone any farther than that mere summary and endeavored to explain to them what the probable outcome would be if you were given time to meet these obligations? A. I have not.

Q. And so far as you know, their information is de-

(Testimony of J. J. Seymour.)

rived solely from the statement of the accounts up to the present time? A. Yes.

Q. But I understand your judgment as to your ability to pay out this interest and keep the company going as a paying concern is based partially upon the outlook for the future? A. Yes.

Q. When did you advance your rates?

A. The latter part of last year.

Q. For November? A. November.

Q. Does that account entirely for your increased revenue, or have you been extending your business to additional consumers?

A. Well, it is entirely owing, you might say, to the increased revenue, because we were loaded at that time.

Q. Then your increase in capacity by the expenditures you are about to make and have partially made would add to that in the way of taking on new consumers?

A. Yes.

Q. When did you first hear anything about the proposed reorganization of this company?

A. The first time I heard any definite statement in regard to the matter was after we had defaulted six months on the bonds. I heard so in New York City I saw that plan.

Q. Were you on there then? A. Yes.

Q. Did you have any conference with anyone of them with respect to it?

A. I talked with Mr. Street, and it was shown to me.

Q. Well, at the time that this foreclosure suit was commenced who were the stockholders of this company?

(Testimony of J. J. Seymour.)

A. Of the San Joaquin Electric Company? Well, the control of it was in Fresno here. Mr. Eastwood and myself together owned a control of the stock. A very large block of it was held in Chicago and is now owned I think by the First National Bank.

Q. Was any of the stock owned by the bond-holders?

A. There was.

Q. Do you know about how much, Mr. Seymour?

Mr. EASTWOOD.—Very small amount.

The WITNESS.—I can't say offhand, but probably one-tenth or something like that.

Q. What is the amount of the stock outstanding of the company?

A. Eight hundred thousand less 10-790.

Q. You think about ten per cent of that was owned by the bondholders, but by different bondholders. Was that held in a block by the representatives of the company or was it distributed?

A. Our books show it was distributed. I may be in error as to the amount being one-tenth, but there was quite a considerable amount distributed.

Q. Do you know where this idea of the reorganization of the company originated?

A. I do not. When Mr. Street was here he outlined in a vague way some reorganization in which he proposed reducing the amount of the indebtedness, and after we saw him he went to England. It was while they were in England, I understand, that the plan was elaborated.

(Testimony of J. J. Seymour.)

Q. Mr. Street was here before your defalcation in the interest of January 1st, 1899, was he not?

A. No, I never saw him until after our first default actually occurred.

Q. Did he undertake to outline to you what the plan of reorganization was at all? A. No.

Q. Did he ask you to co-operate, anything of that kind?

A. No. He stated he was not empowered to do anything definitely. He was simply here finding out the condition of affairs so that he could go back and make a report.

Q. When did you first see this proposed plan of reorganization?

A. I saw that in New York City some time in July. That was after the six months' default, and I believe it was after the notice of, what do they call the term—

Mr. CORY.—Notice of demand for payment was made by the Mercantile Trust Company. Demand had been made. That was after the six months had expired.

Mr. WORKS.—Q. Were you asked at that time by Mr. Street or anyone else to go into that plan of reorganization?

A. He made a proposition to me that he would ask to have me appointed receiver if I would make no formal defense, or defense as a stockholder or as president of the company against the foreclosure proceedings, and I declined to do so. Afterwards he made a proposition that he would have the Mercantile Trust Company act,

(Testimony of J. J. Seymour.)

asking that I be appointed receiver if I would agree to conduct it on ordinary business principles, and so I went in with no obligation whatever, I went in as receiver with no—

Mr. CORY.—The only thing was that you would not charge more than a certain price?

A. Yes, my salary would not be more than a certain amount, providing the Judge granted me more than that as receiver. His idea was not to load it up with undue receiver's salary.

Mr. WORKS.—Q. Well, now was that matter of reorganization ever taken up and acted upon by the local stockholders here? A. It never was.

Q. Was any consent ever given by any of the local stockholders to that or any other plan of reorganization?

A. Not that I know of.

Q. How much of the stock did you own at that time?

A. I owned a little over one-fourth.

Q. How much did Mr. Eastwood own?

A. The same amount.

Q. And he and you together owned a controlling interest in the stock at that time? A. Yes, sir.

Q. And is that the condition at the present time?

A. It is.

Q. Now, in this proposed plan of reorganization that is made a part of the condition is this clause: "Fourth. One hundred thousand dollars of the capital stock will be issued to certain parties in Fresno for the water rights transferred by them to the old company, providing they

(Testimony of J. J. Seymour.)

facilitate the foreclosure of the mortgage." Do you know to whom that refers?

A. I presume that refers to Mr. Eastwood and myself.

Q. You were the parties referred to, interested in those water rights, were you? A. Yes, sir.

Q. Was that provision called to your attention at the time you had the consultation with Mr. Street?

A. Yes. I will state that when Mr. Street was here in March or April, Mr. Eastwood and I in conference with him, after telling him that we saw no means by which the foreclosure proceedings could be prevented, the finances of the company not materially improving and the floating indebtedness being so much, we submitted to him, as a matter of equity to put before the bondholders that we should be allowed, we asked that we be allowed some of the bonds of the new concern in case of reorganization. We asked it as a matter of equity. That was the talk in our talk with him while here, asking him to present that to the bondholders, as a matter of equity. We had devoted several years of our time here and had worked at a very low salary, put in all our time at it, and we considered it a matter of equity; we considered it a good concern and a matter of equity, we should have something in it along with the bondholders, and after he came back he said that was the best he could do in the matter. It was a matter of equity we presented it as all the time.

(Testimony of J. J. Seymour.)

Q. Well, then, this proposal in the plan of re-organization grew out of that claim of yours that you should be allowed something? A. Yes.

Q. As a matter of equity?

A. Not on account of our rights as stockholders as much as our rights as individuals.

Q. What was the condition of these water rights referred to here at that time? Were you and Mr. Eastwood the owners of any water rights in your individual capacity at that time?

A. We had transferred them to the company and we had some rights up there, in reservoir sites, filings, etc.

Q. Then your proposition was that you would release whatever interest you might have in the way of water rights to the company, and, as a matter of equity as resulting from that, you should be allowed—

A. Well, not so much that as what we had already put into the concern.

Q. That you should have some interest in the capital stock of the new company if it was reorganized?

A. Yes, sir.

Q. Now, after you were appointed receiver of the company were there any further negotiations with respect to this plan of reorganization? Has it ever come up again? A. No, it never has.

Q. And so far as you know, if a foreclosure should result and this property be sold, your interest would be lost entirely?

(Testimony of J. J. Seymour.)

A. I have no assurance, no legal assurance whatever that I will get anything out of it.

Q. Either in the way of capital stock in the new company if reorganized, or in any way?

A. No, sir.

Q. Have you any doubt, Mr. Seymour, but if an order of court was made for that purpose, that you should apply the surplus revenues of this company to the payment of the interest already accrued, that you could so conduct and manage this company as to pay this back interest and free it from the indebtedness for the interest?

A. And also the indebtedness—the other indebtedness?

Q. I mean the floating indebtedness, I don't mean the bond indebtedness?

A. Yes, I think the company should in a few years work out.

Q. Well, in a few years—as far as the interest is concerned upon these bonds, it could be done in a very short time with the earnings you are making now with the company?

A I mean the interest, to take care of the interest and the floating debt.

Mr. CORY.—You mean all the accumulated interest?

Mr. WORKS.—Yes, the accumulated interest. What do you understand to be the amount of the floating indebtedness at the present time?

(Testimony of J. J. Seymour.)

A. At the time the company went into the hands of the receiver there was about $85,000, somewhere about $80,000, I think, due the General Electric Company, and probably five or six thousand dollars floating indebtedness, here about town. The bonds are out covering that.

Q. But, as I understand you to say, as far as the indebtedness to the General Electric Company is concerned, that indebtedness has been taken up?

A. Taken up by somebody.

Q. And that it is simply now represented by the bonds?

A The parties that took it up have possession of the bonds.

Q. Has any claim ever been made on this company for that indebtedness as a floating indebtedness since it was taken up by the bondholders, if it was?

A. No, not that I know. I don't even know who holds it. There was some $7,000 local indebtedness, about town, at that time, and since that time, of course, the receiver's certificates were issued.

Q. What is your judgment, Mr. Seymour, as to whether this property is or is not ample and sufficient security for the payment of those bonds?

A. Based on the present revenue capacity?

Q. Yes.

A. I think it is, were time allowed.

Q. And if the company were reorganized on the basis proposed in this plan and the bonds in that way

(Testimony of J. S. Eastwood.)

extinguished, this would be an excellent piece of property, would it not? A. Yes.

Mr. WORKS.—I think that is all.

J. S. EASTWOOD, being called as a witness for intervenors, and being duly sworn by the Special Examiner, now testifies as follows:

(By Mr. WORKS.)

Q. What is your name?

A. John S. Eastwood.

Q. What is your occupation?

A. Civil engineer and superintendent of the Electric Company.

Q. How long have you been connected with the Electric Company? A. Since its inception.

Q. What connection have you had with the company?

A. I have had that same connection with the company since its organization.

Q. Are you also a stockholder of the company?

A. I am.

Q. To what extent?

A. I have something over one-fourth interest.

Q. Have you held that amount of stock since its organization? A. Yes, sir.

Q. Who has had charge of the construction work and mechanical work done by the company since its organization? A. I have.

Q. Of what does the property consist, speaking in a general way?

(Testimony of J. S. Eastwood.)

A. It consists generally in water rights in the North Fork of the San Joaquin river, the diversion works, storage reservoirs, of which there are two completed and another under way, pipe line, power-house, transmission line, sub-station, and machinery and distributing system in the city of Fresno.

Q. What connection has the Electric Company with the Fresno Water Company?

A. The Electric Company is the owner of the Fresno Water Company.

Q. And the two are operated together, that is, by the same force of employees?

A. Yes. The employees are kept separate.

Q. You keep the accounts of the two separate?

A. Yes, sir.

Q. But they are really owned by the same persons?

A. Yes, sir.

Q. What additions have been made to the system of the company since the defalcation of the company in its interest the first of the year 1899, speaking in a general way?

A. The storage reservoir known as Chilcoot Lake has been built, a large amount of work has been done on the Crane Valley storage reservoir, and quite considerable extension has been made in the city of Fresno in the distribution system.

Q. What have these additions cost, in round numbers?

(Testimony of J. S. Eastwood.)

A. It would be pretty hard to get at that exactly. The books will show.

Q. Can you say something near the amount, according to your recollection?

A. Yes. Chilcoot reservoir was in the neighborhood of $3,500, Crane Valley reservoir has cost in the neighborhood of $20,000. I have not the item of the other extensions.

Q. What was the occasion and necessity of these additions to the system?

A. The necessity for an additional water storage was the recurring dry years that cut off the water supply, necessitating storage to augment the supply; and the extension of the city distribution system was in the nature of a completion of the distributing plant.

Q. I understand one of these reservoirs is only partially completed? A. Yes, Crane Valley.

Q. Why is it it has not been entirely completed?

A. We were enjoined from proceeding with the work by the United States Government and are awaiting permission from the Department.

Q. Are steps being taken to obtain the necessary consent of the Government to complete the work?

A. Everything that could be possibly done has been done to facilitate the acquisition of the permit.

Mr. CORY.—A portion of it was in the forest reserve.

Mr. WORKS.—Q. Well, what may be said to be the present prospect of being able to get that permit?

(Testimony of J. S. Eastwood.)

A. There seems to be very little in the way at the present time.

Q. Is it the purpose to go on and complete the work when that permit is obtained? A. Yes, it is.

Q. What will probably be the cost of completing the dam and reservoir?

A. Possibly in the neighborhood of $15,000 more.

Q. Is that the one that has already cost you $20,000?

A. Yes, sir.

Q. And the total cost you estimate will be about $35,000? A. Something in that neighborhood.

Q. What will be the effect of that, Mr. Eastwood, as adding to the value and efficiency of the entire system?

A. Well, it will make the plant absolutely independent in the matter of water. It will provide sufficient water for any emergency for any year.

Q. What was the effect of the shortage of water upon the earning capacity of your plant without these facilities for storage?

A. The revenues were almost entirely cut off during the months of August and September, in those two years in succession.

Q. Were they affected during any of the balance of the year? A. No, not appreciably.

Q. Then with those facilities added the company would be independent and would be enabled to increase its system, distributing system?

A. Yes. I might state that there are a great many large consumers of power that have refused absolutely

(Testimony of J. S. Eastwood.)

to patronize us unless they are assured that the current will be supplied and continuously, which the storage reservoirs will give us a chance to assure.

Q. What is your judgment as to whether you would have been enabled to meet the obligations of the company for its interest if it had not been for the extreme drouth that you passed through?

A. I think we could have met our obligations.

Q. What is your judgment as to the ability of the company now, if a reasonable time and opportunity is given, to meet the interest and keep itself afloat?

A. With its present revenue and the revenue that it can readily take on as soon as it has additional machinery to carry it, it will be amply able to take care of all its obligations.

Q. It has been shown here that the company has increased its rates. Are the rates that prevail now reasonable rates and such as you think can be maintained?

A. They are moderate rates and lower than in many other cities in the state.

Q. What was the reason for your charging the lower rates before this increase was made?

A. The reason was that we were newcomers in the field and in competition with another company that was furnishing gas, and that necessitated our starting with low rates in order to acquire business at all.

Q. With these new and additional rates, do you find that that is any obstacle to the increase of your business?

(Testimony of J. S. Eastwood.)

A. It has been no obstacle to the increase of the business as our plant is still loaded up the same as it was before the change in the rates.

Q. Are you able to state how your rates for lighting compare with the rates for lighting by gas?

A. Well, in some cases they are about equal at the present time with the rates for gas at two dollars a thousand, in other cases they are probably a little lower.

Q. Well, on an average how would the rate be with the price of gas?

A. Well, it would probably average about equal with the price of gas at the present rates.

Q. Now, has your increase in rates been for lighting only or has it been for power?

A. Been for lighting only.

Q. You have made no increase in your rates for furnishing power? A. No, we have not.

Q. Could your rates for furnishing power be increased without detriment to the business of the company do you think?

A. They might be, yes, in a number of instances.

Q. What is your judgment as to whether this property is ample and sufficient security for the payment of these outstanding bonds?

A. With the showing of the revenues, it is quite ample security.

Q. When did you first hear of this proposed reorganization of the company?

A. I think it was sometime in August, 1899.

(Testimony of J. S. Eastwood.)

Mr. SEYMOUR.—July, when I was in New York, July.

The WITNESS.—July, 1899.

Mr. WORKS.—Q. Do you know who that proposition came from? A. No, I do not.

Q. How did you first learn of it?

A. I learned of it from Mr. Seymour.

Q. Did you have any talk with Mr. Street about that when he was here?

A. No, not when he was out here on his first trip.

Q. Were you invited to join in that plan of reorganization? A. No, I was not.

Q. You knew of the clause in that proposition with respect to allowing someone in Fresno a hundred thousand dollars of the capital stock, did you?

A. Yes, I knew of it.

Q. Did you know who that referred to?

A. I suppose it referred to us but I never heard it said.

Q. Was there anybody else so situated that it could have reference to them that you know of?

A. I don't know of anyone else, no.

Q. When you learned of the proposed reorganization did you learn of that feature of it from Mr. Seymour?

A. Yes, sir.

Q. Was any consent ever given by you to the reorganization of the company under any terms?

A. None whatever.

Q. Do you believe, yourself, that there is any reason or necessity for the reorganization of the company?

(Testimony of J. S. Eastwood.)

A. I do not.

Q. Do you know, Mr. Eastwood, whether the condition of things and the reason for your inability to meet the obligation of the company on account of the extreme drought was ever explained to the bondholders?

A. I don't believe that it ever was.

Q. Well, do you know whether since the foreclosure suit was commenced any effort has been made to apprise them of the present condition and probabilities of the company being able to meet its obligations and pay the interest on the bonds?

A. No. I don't think anything has been done in that line, to my knowledge.

Q. What connection have you had with the company under the receivership?

A. The same as before, superintendent and engineer of the company.

Q. The management of the company has continued practically the same as it was before with the simple change from the presidency to the receivership by Mr. Seymour, hasn't it? A. Yes, sir.

Q. With respect to this Hanford extension, that is more than paying its own way? A. It is, yes, sir.

Q. That is to say, it is paying the interest upon indebtedness and paying something upon the principal each month? A. Yes, sir.

Q. Is Mr. Seymour's statement as to the amount that is paid each month substantially correct?

A. It is. They are paying $600 per month.

(Testimony of J. S. Eastwood.)

Q. And as the interest charge grows less the amount paid on the principal increases each year.

A. It does.

Q. What rate of interest is being paid on that indebtedness? A. Ten per cent.

Q. With respect to these items of floating indebtedness that are outstanding, if the Court should be disposed to make an order that the revenues of the company be applied to the payment of the interest on the bonded indebtedness, would there be any difficulty probably in carrying that floating indebtedness along without its actual payment?

A. It is not very large. I don't know that there would be.

Q. What is the extent of it?

A. Well, I don't know at the present time.

Q. Could you give us something near, outside of this—

Mr. SEYMOUR.—I think, outside of the General Electric Company—

The WITNESS.—Something like $5,000.

Mr. SEYMOUR.—Seven thousand dollars, I think I stated, something in that neighborhood.

The WITNESS.—It is mostly salaries.

Mr. WORKS.—I want to get, as nearly as I can, the condition of the indebtedness, because I may feel disposed to ask the court to make an order to apply these funds and pay up this back interest.

(Testimony of J. S. Eastwood.)

Mr. SEYMOUR.—If you can leave this, we will look it up.

Mr. CORY.—They can give it to you in a short time.

Mr. SEYMOUR.—So that the stenographer can insert it in his notes. If it is any object, I will look through the list of stockholders, if you want to know definitely about the English bondholders, I can tell.

Mr. WORKS.—I might ask that question of Mr. Eastwood now. I wish you would state what amount of stock is owned now by the bondholders of the company.

Mr. SEYMOUR.—We were informed that they were given out in the sale of bonds and we presume they are in the hands of the bondholders.

The WITNESS.—About $56,000 of the stock is held in England. However, there is not any of it in the name of the people that we suppose to be the present bondholders.

Q. You don't know then whether the bondholders hold any of the present stock of the company or not?

A. No.

Mr. CORY.—At the par value? A. Yes.

Mr. SEYMOUR.—Our stock book shows there is that much stock in the name of English holders. They may be in this country for all we know.

Mr. WORKS.—Q. What is the par value of the stock?

A. One hundred dollars a share.

Mr. CORY.—A hundred dollars a share.

(Testimony of J. J. Seymour.)

Mr. SEYMOUR.—They own pretty near one-fifteenth of it.

Mr. WORKS.—Well, I think that is all I want to ask Mr. Eastwood.

The further taking of testimony herein was here continued until 2 o'clock this afternoon.

Afternoon.

Mr. WORKS.—I want to ask Mr. Seymour a few more questions

J. J. SEYMOUR, recalled for intervenors for further examination, testified as follows:

Mr. WORKS.—Q. What attorneys, if any, has the Electric Company employed to defend this action?

Mr. CORY.—Bicknell, Gibson & Trask, of Los Angeles.

Mr. WORKS.—Q. What, if anything, have they been doing for and on behalf of the company with respect to the present contention of the intervenors in their efforts to prevent the foreclosure of this mortgage?

A. Simply an attitude of lookers-on.

Mr. CORY.—They have put in an answer, that is all. I will simply state that they have appeared and answered to the complaint in intervention.

The WITNESS.—Mr. Cory attended to that.

Mr. WORKS.—Q. They have not, so far as you know,

(Testimony of J. J. Seymour.)

taken any active part in any litigation that has been going on so far in the matter? A No.

Q. Have they attended any of the sittings for the taking of testimony? A. No.

Q. On this question, so far as you know?

A. No.

Q. Are you still the president of the Electric Company? A. Yes.

Q. Was the employment of attorneys to represent you by you personally or through someone else?

Mr. CORY.—Through me.

The WITNESS.—Through someone else.

Mr. WORKS.—Q. Have you yourself given them any instructions to make any defense of the suit itself or of these proceedings of the intervenors to prevent the foreclosure of the mortgage?

Mr. CORY.—Nothing except that is shown by the record.

The WITNESS.—Nothing except what is shown by the records, the answer.

Mr. WORKS.—I guess that is all.

J. M. COLLIER, recalled for intervenors for further examination, testified as follows:

Mr. WORKS.—Q. Did you make out the statement of account that you were requested to make?

A. Yes, sir.

(Testimony of J. M. Collier.)

Q. Is this the account as you have made it (exhibiting paper to witness)? A. Yes, sir.

Mr. WORKS.—We offer this as Intervenors' Exhibit, letter "E."

(Offer marked Intervenors' Exhibit "E," and hereto appended.)

Q. You have included in the statement for 1897 bond interest $31,150. That is the interest that Mr. Price testified he left out of his statement?

A. I don't know that. I don't know that you had any testimony to that effect. It was evidently left out.

Q. What, say?

A It was left out of his statement.

Q. The report that he furnished accompanying the statement showed that he left that out entirely. Then you have in this account, construction $43,495.64. Was any part of that paid out of the proceeds of the bonds?

A. That is '97?

Q. That is '97, yes, sir.

A. I will look and see whether there was. I think it was.

Q. Well, it must have been, I presume. You had not money enough from the earnings to pay it did you?

A. No, sir.

Q Either it was paid out of the money realized from the bonds or you borrowed it somewhere else?

A. That was the condition exactly.

Q. Now, in the following year, 1898, you have an

(Testimony of J. M. Collier.)

item of Repaid, Loans, $14,671.62. Was that money that you had borrowed for the year 1897?

A. Yes, sir.

Q. And you have in this year Construction, $16,522.21. Do you know where the money came from to pay that?

A. That was money borrowed.

Q. Then so far as your construction is concerned, you kept borrowing and repaying and borrowing again?

A. Yes, sir.

Q. This construction account of $16,522.21, could you tell whether that was a part of the expenditures included in Mr. Price's account? A. That is '99, is it?

Q. That is '98.

A. In his statement he has no construction.

Q. Not in that way, but he has a statement of the expenditures. The question is whether that will cover it?

A. He has in his statement, fuel, salaries, sundry expenses and taxes, power, or current, but no construction.

Q. The question is whether any of those would cover that amount?

A. No, sir, they will not.

Q. That is in addition to anything that is contained in his account, is it? A. No, sir.

Mr. CORY.—You mean "Yes, sir." He says it is in addition?

Mr. WORKS.—Q. That is in addition to what is included in his account, is it?

A. That is construction on that statement. It is in

(Testimony of J. M. Collier.)

addition to what is included here (referring to Intervenors' Exhibit "A.")

Q. Then with the exception of the amount of construction that you have set out here and the loans that have been repaid, your account corresponds with that of Mr. Price, doesn't it?

A. Well, I have not verified it, but it should; yes, sir.

Q. Those are the only two items that you think there is any discrepancy about?

A. That he has left out, yes, sir.

Q. Then you have in the year 1899, construction $3,437.10, and repaid on loans, $26,340.11. That so far as the loans are concerned is the same as in the other case, you borrowed at times and repaid at times?

A. Yes, sir that is what that represents, repaid loans previously borrowed.

Q. Have you included those amounts derived in that way, as loans, as a part of your credits, your receipts?

A. Well, it was a receipt, of course, but it is not included in the current receipts, the power receipts.

Q. In giving the credit side of your account you have the actual earnings of the company and not what is borrowed? A. The earning is credited separately.

Q. In making this account you have not carried into the credit side of the account anything except the actual earnings or receipts of the company, $41,491.11, for example, in '97. That is the actual amount earned by the company?

A. Actual gross earnings of the company; yes, sir.

(Testimony of J. M. Collier.)

Q. Not what was borrowed?

A. That does include, I don't know, in that case, but in the last two years, '98 and '99, it includes some lamps sold.

Q. But that is the total amount received, not from borrowed money? A. No, sir.

Q. Then you include the money borrowed, or the money paid to refund the money borrowed as a part of your debit account and have not carried it into the credit side of the ledger at all in making this account?

A. I don't believe I understand.

Q. Well, here is an item of Repaid Loans, $14,671.62 that you have charged against the company on the debit side? A. Yes, sir.

Q. You have not credited that on the credit side of the account at all, when it came into the funds of the company?

A. I don't know as I understand the question the way you put it.

Mr. CORY.—He wants to know how that is offset on the credit side? Was there any credit given for that? That is what he means.

Mr. WORKS.—As you make your statement it is not put on the credit side at all?

A. No, sir, no, no, it is not. The deficit in each of those cases represents about the amount borrowed during that year you see.

Q. But the amount of money that you have borrowed,

(Testimony of J. M. Collier.)

that you have given yourself no credit for at all, has gone into the construction account? A. Yes, sir.

Q. That you also charge against the account and give no credit for?

Mr. CORY.—Excuse me a minute. Don't you keep any account of money that you get from other sources besides—

A. Yes, sir, certainly.

Mr. SEYMOUR.—This is not a balance sheet, and in that case, he has overlooked that.

Mr. WORKS.—I am trying to show a discrepancy in this account. Here is an item of some $16,522 that has gone out. Well, that has come in, too, and, although borrowed money, it should be on the credit side of the account, so as to even up, because that $16,522 is in addition to the other receipts of the company.

The WITNESS.—He shows—Mr. Price—net earnings of so much, for instance in '98 he shows net earnings of $3,270, but he leaves out construction.

Mr. WORKS.—Simply because he leaves out, also, the credit of the amount that comes in which is in addition to the property of the company, its assets?

A. Yes, sir.

Q. His manner of keeping it is the correct one, and not yours, if you want to get at the exact condition of the account?

A. Yes. I see what you mean. Well, all moneys

(Testimony of J. M. Collier.)

borrowed were entered up to the credit of parties, and when paid out of course they were charged up with it.

Q. Yes, I understand that, but that is their individual account, not the account of the company itself. In those figures where you charge the company up, in reaching this result, you charge it up with loans repaid, $14,672.62, and you give it no credit at all for the amount received upon those loans, so the account is certainly not correct in that form?

A. I started out seeing it another way.

Mr. CORY.—How is that, Mr. Seymour? There certainly must be a credit there.

Mr. SEYMOUR.—He has undertaken to condense—

Mr. WORKS.—The trouble is, he has only condensed on one side of the house.

Mr. SEYMOUR.—His statement covers three or four sheets, and he has tried to get it in the shape Mr. Price has it.

Mr. JOHNSON.—The Judge's contention is, that must be receipts, all money borrowed.

The WITNESS.—Now you take that. It is simply another form of making it. There is '97. I have the credit in that (handing paper to Mr. Works). It is simply another way of making it out. This deficit shows the amount. Of course it is credited. If you add in the amount borrowed, it balances the account.

(Testimony of J. M. Collier.)

Mr. CORY.—What he wants is a statement showing all the receipts, from every source in the world and all the disbursements and charges of every kind, and that will show the balance if there is any.

Mr. SEYMOUR.—That is the form, and he undertakes to condense it and he don't show what the Judge wants him to show. Of course we never had such a deficit you know.

The WITNESS.—These amounts borrowed should appear above there under the head of receipts. That is what would be a correct way of making it, but I thought you preferred—

Mr. SEYMOUR.—That form there is what he wanted.

Mr. WORKS.—You said there were some discrepancies between your books and Mr. Price's account; upon the basis of actual earnings and actual expenditures that I think shows probably the correct result. You have incorporated in this construction and money paid for repayment of loans and other things without giving the other side of those same items, which of course makes it one-sided; and, of course, it is not to your interest to show it in that form, or mine either, or anybody else's that I know of.

The WITNESS.—I can make it in another form.

Mr. CORY.—What he wants is all the receipts, from any source, and all the disbursements, so as to show how much it ran behind for any one year, or how much you made any one year.

(Testimony of J. M. Collier.)

Mr. SEYMOUR.—One error Mr. Price made—I don't know where he got it—big error—was in '99, he has the receipts $54,000. It is not on the books.

The WITNESS.—Forty-eight thousand dollars—less, in '99.

Mr. CORY.—Mr. Price has it 54.

Mr. CORY.—Haven't you got an annual statement that shows the whole thing? Can't you read that off?

A. Yes. For instance, here—

Mr. CORY.—Annual statement for the year 1897?

A. 1897. Now, if you will permit me to read this.

Mr. CORY.—Read it off. Let us hear it. It shows money borrowed and everything, don't it?

A. Cash receipts—cash on hand January 1st, 1897.

Mr. CORY.—1898 we want, January 1st, 1898. We want your annual statement.

A. You want the statement for 1897?

Mr. CORY.—Yes, for the year 1897.

A. January 1st, 1897. That is where they start out.

Mr. WORKS.—That is right. Amount on hand—

A. Ninety-six dollars and fifty-four cents. Receipts from current for power and lights, $41,394.57; from individuals and other sources $58,127.01. Now I can, of course, tell who those individuals are. Now, disbursed for salaries, supplies, expenses and repairs, under one heading—I can give you the segregation of that if necessary—$22,335.89.

Mr. JOHNSON.—It is a little different here in the statement.

(Testimony of J. M. Collier.)

A. Mistake in copying. Interest on bonds, $31,150; taxes, $1,542.56; interest—that is on small loans—$668.77; personal property, real estate, etc.—that does not exactly apply to the operating expenses—I suppose it does, too. The personal property is a horse or two I bought, I think it is; and some real estate we bought up there, $380.60; construction, extensions and improvements, $43,495.64.

Mr. SEYMOUR.—Does that give the balance now—leaves a cash balance of what amount?

A. Forty-five dollars and sixteen cents and the two amounts balance.

Mr. JOHNSON.—That makes a deficit as it stands here.

The WITNESS.—I have a statement of that kind, Judge, for every year and for every month, as far as that is concerned.

Mr. SEYMOUR.—Now, then, hadn't you better give off the next year?

Mr. CORY.—Whatever the Judge wants.

Mr. WORKS.—If he had it made out in a written statement, that would be better You can do it at any time and the Examiner can attach it to the report.

The WITNESS.—I can just have that copied.

Mr. WORKS.—Intervenors withdraw their Exhibit "E."

(Testimony of J. M. Collier.)

Mr. CORY.—Then don't you want to substitute for that copy of the annual statement of the company for the years 1897 and 1898.

Mr. WORKS.—Suppose you strike out all about that and ask him to supply the other and mark it "F."

Mr. CORY.—Exact copy of that for '97, '98, and '99 one for 1900 too.

Mr. WORKS.—Yes, better put it all in. Better not withdraw that, but supply the other and mark it "F." Did you want to examine any of these gentlemen now?

Mr. SEYMOUR.—Was that matter of the betterment account of the water company—the Judge said they would enter into that later on. In that statement of the water company's receipts and expenditures for those three years there was no mention made of the betterment account for those years.

Mr. WORKS.—Well, that is not material in this investigation.

Mr. SEYMOUR.—That would wipe out that $12,000 surplus.

Mr. WORKS.—Well, we don't care about going into that.

Mr. CORY.—It simply shows there was not the surplus on hand.

Mr. WORKS.—The evidence shows whatever there was was used by the electric company, and this account shows just what the electric company used. I don't see that it is material.

(Testimony of J. J. Seymour.)

(Operating Statements for the year 1897 and 1898 and Annual Statements for the years ending December 31st, 1899, and December 31st, 1900, of defendant herein, furnished to Examiner by the witness Collier in pursuance of understanding hereinbefore set forth, are hereto appended, marked Intervenors' Exhibit "F.")

JOHN J. SEYMOUR, recalled for cross-examination, testified as follows:

Mr. CORY.—Q. Has there ever been, Mr. Seymour, any surplus revenues from the Electric Company since it has been established? A. No.

Q. And have there been during the years the Electric Company was doing business any surplus revenues from the Water Company after payment of all expenses, betterments and payments of that kind?

A. Well, no.

Q. As I understand you, the Electric Company never paid the Water Company any interest on any of its indebtedness or money that the Electric Company borrowed of the Water Company? A. No.

Q. You have seen these accounts as prepared by Mr. Price from the books of the company? A. Yes, sir.

Q. Do those statements show the exact condition of the company, and if not in what respect do they not, as you remember it?

A. Well, they show for each year a surplus, which would seem to indicate that there was so much accumulation over and above the operating and constructive ex-

(Testimony of J. J. Seymour.)

penses, but as a matter of fact at the end of each year—at the end of the year the books indicate that we didn't have that amount.

Q. Have you ever had any surplus at all?

A. Well, when we paid interest there were generally, before the time of interest paying we accumulated some money.

Q. Enough to pay your interest? A. Yes, sir.

Q. Well, do you know why it is that those statements show a surplus, what should be charged which the statements do not show?

A. I presume it is because it does not take into account all the items of construction.

Q. And improvements, the money that you have expended in bettering the plant?

A. Bettering the plant.

Q. And extending its service?

A. At the time those improvements began we were only partially constructed. We had the current into town, to be sure, but the town was not properly wired, and the plant was not finished at the upper end. There was construction practically going on all along the line.

Q. As I understand it, these amounts expended for construction do not appear in Mr. Price's statement?

A. No. That seems to be where the discrepancy is between his statements and ours.

Q. Mr. Collier has been your bookkeeper and secretary, has he, all these years? A. He has.

(Testimony of J. J. Seymour.)

Q. And he has given the matter attention, has he, the matter of keeping the books?

A. Yes, sir.

Q. Have you had any particular charge of them?

A. No, except—

Q. General supervision? A. Supervision.

Q. You know from your own experience and knowledge that those books have been kept correctly, do you not?

A. I do. He makes statements from time to time.

Q. And you know those statements are correct?

A. Yes, sir, according to his theory of book-keeping.

Q. Mr. Price's statement, as I understand it, is under different headings of expenditures and receipts than those adopted and carried through the books by Mr. Collier? A. In some cases, yes, sir.

Q. So it is very difficult to segregate the different items and make the two statements correspond?

A. Yes. In some particulars they are identical, a good many, but there are discrepancies.

Q. Now, about what was the condition of the company with reference to its debts over and above its assets on the 1st of January when you defaulted in your interest in round numbers?

A. I couldn't state that, Mr. Cory. I will merely state that we had no funds on hand to make the interest payments, nothing like, and by no manner of financing could we collect enough.

Q. What efforts if any did you make towards getting the amount of money to pay your interest?

(Testimony of J. J. Seymour.)

A. I had exhausted my credit the six months previously. I had to borrow extensively then on my own personal assurance of repayment. Immediately following that, came the big, bad year.

Q. The drought? A. The drought—dry year.

Q. That had an effect, I presume, to injure your credit, as well as cutting off your revenue?

A. Yes, sir, and also that year increased our expenses materially, because we tried to carry certain contracts here in town in which we not only did not get payment but we paid out money additional, so that our expenses were even greater than they had been running.

Q. And all those causes working together prevented you from raising the money?

A. Prevented us from even trying to do anything the 1st of January.

Q. Well, since that time, particularly in the past two years, the condition of the company has been getting very much better, has it not? A. Decidedly better.

Q. So that at the present time your receipts are very largely in excess of your expenditures? A. Yes, sir.

Q. And, in fact, the company is in such condition now that if this litigation were ended you could go on and pay your interest and be a going concern, without difficulty, you think? A. I think so.

Q. Now the water company, you have always kept that separate, the accounts of the water company and the electric company? A. Yes, sir.

(Testimony of J. J. Seymour.)

Q. The officers of the company are the same except of course some of your employees are different?

A. Yes.

Q. The water company, you borrowed considerable money of it, did you not, for the purpose of making payments on the bonded indebtedness, or interest on the bonded indebtedness of the electric company?

A. Yes; whenever we—

Q. And this 1st of January, 1898, you couldn't borrow any more money of the water company, could you, because it didn't have any more than enough money to pay its own interest on bonded indebtedness?

A. Yes.

Q. In other words, it had become almost crippled, had it not, by reason of large advances to the electric company?

A. The water company had become crippled. The water company is now in the position of being partially defaulted on its bonds by reason of the attempt to bolster up the other company. We have attempted in the past year to help the water company back to its basis of paying its bonds at the prescribed time, and we have not exactly done so at present.

Q. And that condition has been occasioned because of the attempt of the water company to assist the electric company?

A. Assist the electric company.

Q. And a large amount of money it did actually loan to it as shown by the statements? A. Yes, sir.

(Testimony of J. J. Seymour.)

Mr. CORY.—I think that is all.

Mr. WORKS.—Q. Did you at any time furnish an account of the condition of the electric company to the Municipal Investment Company, or to Mr. Coffin of that company?

A. We furnished them with monthly statements, Judge, up to a certain period. I can't at present state when that was.

Q. Well, did you furnish them, in addition to your monthly statements, did you furnish them a full statement and account of the condition of the company, at any time? A. I presume we did.

Q. Well, did you keep copies of whatever you did furnish them?

A. No; I don't think we did, as a general thing, because they would be taken from the books; and if it was a question of revenue for the existing year or the year succeeding we would estimate what the increase of revenue should be, and all that.

Q. Well, whatever statements you made to the Municipal Investment Company or to Mr. Coffin were correct statements from your books, were they not?

A. So far as the books showed, yes, sir.

Q. Well, they were correct transcripts from your books? A. Yes.

By stipulation of counsel appearing at the hearing, the signing of the testimony by the witnesses is waived.

Intervenors' Exhibit "A."

Statement of Earnings and Expenses of The Fresno Water Company, for the years 1897-8-9

1897.

Earnings:		
Received from consumers		$47.601.20
Operating Expenses		
Fuel	$2,914.58	
Salaries	7.607.45	
Sundry expenses and taxes	8,409.43	
Power	6,000.00	
Interest	257.80	25,189.26
Net earnings:		22,411.94
Interest on bonds		19,500.00
Surplus for 1897		2,911.94

1898.

Earnings:		
Received from consumers		$48.913.77
Operating Expenses		
Fuel	4,836.90	
Salaries	7,637.20	
Sundry expenses and taxes	7,079.65	
Power	6,000.00	
Interest	589.40	26.143.15
Net earnings:		22.770.62
Interest on bonds		19.500.00
Surplus for 1898		3,270.62

1899.

Earnings:		
Received from consumers....		48,626.19
Operating Expenses		
Fuel....	1,049.82	
Salaries....	7,863.65	
Sundry expenses and taxes..	7,447.94	
Power.....	4,500.00	
Interest.....	338.20	21,199.61
Net earnings:.....		27,426.58
Interest on bonds.....		19,500.00
Surplus for 1899.....		7,926.58

Intervenors' Exhibit "A." J. W. G.

Intervenors' Exhibit "B."

Statement of Earnings and Expenses of San Joaquin Electric Company for the Years 1897, 1898 and 1899.

1897.

Received from consumers...		$41,520.84
Operating Expenses		
Salaries... ....$14,374.10		
Supplies....	3,358.81	
Expense.....	5,281.76	
Repairs....	2,714.62	
Power-house expenses..	3,001.50	
Substation....	853.53	
Interest....	1,057.72	30,642.04
Net earnings:.....		10.878.80

1898.		
Receipts		38,105.90
Operating Expenses		
Salaries	14,787.60	
Supplies	1,118.19	
Sundry expenses	6,572.87	
Interest	1,453.75	23,932.41
Net earnings:		14,173.49
1899.		
Receipts		54,415.74
Current	$54,057.40	
Net from Mdse	358.34	

Operating Expenses		
Salaries	15,168.50	
Supplies	815.22	
Sundry expenses	6,173.44	
Interest	1,316.22	
Repairs	985.08	24,458.46
Net earnings:		29,957.28

Intervenors' Exhibit "B." J. W. G.

Intervenors' Exhibit "C."

Statement of Resources and Liabilities of San Joaquin Electric Company, December 31, 1899.

Resources:			
Due from First Nat. Bank of Fresno .		248.58	
Property..		2,157.45	
Permanent improvements..		800,000.00	
Fresno Water Co. stock		165,000.00	
Profit and loss a-c...		9,979.04	
Bonds on hand.. .. .		31,000.00	
Real estate..		1,074.51	
Hanford extension ..		34,865.26	
Bond interest..		36,750.00	
Construction		363,990.06	
Water storage..		2,634.18	
Due from sundry individuals:			
Fresno Agr. Works ..$	17.44		
Fresno Water Co... .	1,164.60		
J. M. Howells, Trustee..	2,000.00 2,000.00		
J. J. Seymour, Receiver	638.95		
J. M. Howells..	250.00		
E. F. Tulley....	10.00		
San Joaquin Mining Co...	191.45	4,272.44.	1,451,971.52

Liabilities:		
Capital stock	790,000.00	
Bonds payable	555,000.00	
Bills payable	5,249.98	
Mercantile Trust Co. due Sep. 1, '99	36,750.00	
H. G. Lacy Co.	26,909.05	
Receiver's certificates outstanding	8,000.00	
Fresno Water Co.	19,578.19	
Due to sundry individuals	10,484.30	1,451,971.52

Intervenors' Exhibit "C." J. W. G.

Intervenors' Exhibit "D."

Statement of Resources and Liabilities of Fresno Water Co., Dec. 31, 1899.

Resources:		
Real estate	$ 20,660.25	
Permanent improvements	632,758.00	
Treasurer	2,768.58	
Franchise	5,000.00	
San Joaquin Elect. Co.	19,578.19	$680,765.02

Liabilities:		
Capital stock	325,000.00	
Bond a-c	325,000.00	
Profit and loss	14,975.42	

Ill. Trust and Sav. Bank.....	14,625.00	
J. J. Seymour, Receiver.....	1,164.60	680,765.02

Intervenors' Exhibit "D." J. W. G.

Intervenors' Exhibit "E."

SAN JOAQUIN ELECTRIC COMPANY.

1897.			
Receipts:			
Balance.....		96.54	
Power or current		41,394.57	41,491.11
Operating Expenses			
Salaries, supplies,			
Taxes, repairs, etc.	$23,878.45		
Interest.....	668.77		
Personal property real .			
estate.....	380.10	24,927.32	
Bond interest.....	31,150.00		
Construction.....	43,495.64	74,645.64	99,572.96
Deficit			58,081.85
1898.			
Receipts:			
Balance.....		45.16	
Current and lamps			
sold.....		38,999.32	39,044.48
Operating Expenses			
Ex. interest and taxes.	8,026.62		
Salary.....	14,787.60		

Carbons	1,118.19		
Personal property and real estate	141.30	$24,073.71	
Bond interest	15,750.00		
Construction	16,522.21		
Repaid loans, etc.	14,671.62	46,943.83	71,017.54
Deficit			$31,973.06

Intervenors' Exhibt "E." (1) J. W. G.

SAN JOAQUIN ELECTRIC COMPANY.

1899.			
Receipts:			
Balance		1,188.35.	
Current and lamps sold		47,952.21	49,140.56
Operating Expenses			
Salaries	17,890.95		
Supplies, lamps, etc.	3,516.92		
Carbons, etc.	973.37		
Ex., taxes and interest.	7,028.15.	29.409.39	
Construction	3,437.10		
Water storage and construction	5,457.76	8,894.86	
Repaid on loans.		26,340.11	64,644.36
Deficit			$15,503.80

Intervenors' Exhibit "E." (2) J. W. G.

Intervenors' Exhibit "F."

OPERATING STATEMENT FOR THE YEAR 1897.

Cash Receipts:			
Cash on hand Jan. 1st, 1897.....			$96.54
Receipts from current for power and lights.....			41,394.57
From individuals on account and other sources . . .			58,127.01
Disbursements:			
For salaries, supplies, expenses and repairs	$22,335.89		
Taxes	1,542.56		
Interest..	668.77		
Personal property and real estate ..	380.10	24,927.32	
Interest on bonds..	31,150.00	31,150.00	
Construction, extension and improvements	43,495.64	43,495.64	
Balance	45.16	45.16	
		$99,618.12	$99,618.12

OPERATING STATEMENT FOR THE YEAR 1898.

Receipts:			
Balance on hand Jan. 1st, 1898....			$45.16
On account current sold	$37,432.28		
Mdse sales, etc. ...	1,567.04		38,999.32
From banks, etc...			33,161.41
Disbursements:			
Expense, interest and taxes		$8,026.62	
Salary		14,787.60	
Carbons		1,118.19	
Bond interest		15,750.00	
Property and real estate		141.30	
Construction, betments, etc... .. .		16,522.21	
Paid on account, etc.		14,671.62	
Balance .. .		1,188.35	
		$72,205.89	$72,205.89

Intervenors' Exhibit "F" (1). J. W. G.

ANNUAL STATEMENT FOR THE YEAR ENDING DECEMBER 31st, 1899.

Receipts:	
Balance on hand Jan. 1st, 1899 ...	$1,188.35

From current and power		$44,049.11	
From sale of lamps and material		3,903.10	47,952.21
From banks and individuals		7,752.38	
From receiver's certificates, 8,000.			15,752.38
Disbursements:			
Salaries	$17,890.95		
Supplies, lamps, etc.	2,892.92		
Carbons	973.37		
Taxes, interest, etc.	7,028.15		
Rebate on collections	624.00	29,409.39	
On water contract.	2,000.00		
Water storage	3,457.76		
Construction	3,437.10	8,894.86	
Banks and individuals	26,340.11	26,340.11	
Balance		248.58	
		64,892.94	64,892.94

Intervenors' Exhibit "F" (2). J. W. G.

ANNUAL STATEMENT FOR THE YEAR ENDING DECEMBER 31st, 1900.

Receipts:		
Balance on hand Jan. 1st, 1900 ...		$248.58
Current sold for 12 mos.	$50,384.70	
Mdse. sales, lamps, etc.	1,942.45	52,327.15
Rebate on purchase price reservoir site	454.40	
Old French mill, etc.	312.25	766.65
Receiver's certificates..		9,000.00
Individuals and sundries..		1,333.44

Expenses:	
Salaries	$20,683.25
Repairs	2,173.51
Carbons	360.71
Expense..	3,289.71
Taxes..	2,412.23

Arc supplies	401.95		
Interest.	964.50	$30,285.86	
Mdse., lamps, etc. .	1,877.18		
Sundry Ind	1,270.00	3,147.18	
Construction	2,237.18		
Water Storage . . .	17,325.73		
Account water contract.	6,000.00	25,562.91	
Balance		4,679.87	
		63,675.82	63,675.82

Intervenors' Exhibit Exhibit "F" (3). J. W. G.

In the Circuit Court of the United States of America, Ninth Judicial Circuit, Southern District of California.

MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant,
And ALFRED YOUNG CHICK et al.,
Intervenors.
No. 916.

Certificate of Special Examiner.

I hereby certify that the foregoing depositions were taken pursuant to the agreement and consent of the so-

licitors for the respective parties, at the times and places stated in the depositions in the presence of Messrs. John D. Works and Geo. E. Church, solicitors for intervenors, and of L. L. Cory, Esq., as the representative of Messrs. Alexander & Green and Charles Monroe, Esq., solicitors for complainant, in the above-entitled cause, and under my direction; and that previous to the giving of his testimony each witness was by me first duly sworn to tell the truth, the whole truth and nothing but the truth in said cause; that said depositions were taken down by me in shorthand and afterwards transcribed into typewriting, the signing by the witnesses of their respective depositions having been waived.

The foregoing is a correct transcript of the testimony taken and of the proceedings had before me as Special Examiner as above set out. Accompanying said depositions are the several exhibits introduced and referred to and specified herein.

All of which is respectfully submitted this 25th day of March, 1901.

JOHN W. GEARHART,
Special Examiner in Chancery.

[Endorsed]: No. 916. United States Circuit Court, Ninth Circuit, Southern District of California. Mercantile Trust Company, as Trustee, Complainant, vs. San Joaquin Electric Company, Defendant, and Alfred Young Chick et al., Intervenors. Report of Special Examiner. Filed April 13, 1901. Wm. M. Van Dyke, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE MERCANTILE TRUST COMPANY,
Complainant,
vs.
THE SAN JOAQUIN ELECTRIC COMPANY,
Defendant,
A. Y. CHICK et al.,
Intervenors.

Notice and Motion to Apply Moneys.

The intervenors in the above cause move the Court for an order requiring the receiver to apply all moneys received by him from the operation of the plant of the defendant, over and above the necessary operating expenses, to the payment of the accrued and accruing interest on the bonds sued on in this action until such interest is paid and that this suit be continued until the same is paid and satisfied by the surplus earnings of the defendant company.

GEORGE E. CHURCH,
L. A. GROFF,
WORKS & LEE,
Solicitors for the Intervenors.

The complainant and defendant are hereby notified that the above motion will be presented to the Court at its courtroom in the city of Los Angeles, State of California, on the 8th day of April, 1901, at 10:30 o'clock A. M., or as soon thereafter as counsel can be heard.

The motion will be made on the ground that the defendant company has been for some time, and is now, earning a large surplus over and above operating expenses; that it can, if properly managed by the receiver, pay all interest due on its bonds within a reasonable time and avoid the sacrifice of its property and loss to the bondholders that must result from a foreclosure and sale of the property.

The motion will be made on the pleadings, minutes, and files in the case and the evidence taken by the intervenors in support of their bill in intervention.

GEORGE E. CHURCH,
L. A. GROFF,
WORKS & LEE,
Solicitors for Intervenors.

[Endorsed]: No. 916. United States Circuit Court, Ninth Circuit, Southern District of California. The Mercantile Trust Co., Complainant, vs. The San Joaquin Electric Co. Defendant. A. Y. Chick et al., Intervenors. Motion and notice of hearing. Received copy of the within notice this 1st day of April, 1901. Bicknell, Gibson & Trask, Solicitors for Defendant. Chas. Monroe, per P. R. Wilson. Filed April 1, 1901. Wm. M. Van Dyke, Clerk. George E. Church, L. A. Groff, Works & Lee, Rooms 420 to 425 Henne Building, Los Angeles, Cal., Solicitors for Intervenors.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
THE SAN JOAQUIN ELECTRIC COMPANY,
Defendant.

Stipulation as to Taking Depositions of John Ballantine Niven and Henry C. Deming.

United States of America,
Southern District of New York. } ss.

Deposition of witnesses, John Ballantine Niven and Henry C. Deming, on behalf of the complainant, taken on the 25th day of March, 1901, at 120 Broadway, New York City (Borough of Manhattan), in accordance with the annexed notice for the taking of said depositions:

Appearances:

WILLIAM W. GREEN, Esq., of Counsel for Complainant;

CHARLES C. BUELL, Esq., of Counsel for Intervening Petitioners, Alfred Young Chick and William Flanders Lewin.

It is stipulated and agreed by counsel that these depositions may be taken on this 25th day of March, 1901,

with the same force and effect as if the same were taken on the 14th day of March, 1901, the time fixed in the notice for the taking of the same; the said adjournment from the 14th day of March to the 25th day of March, 1901, having been taken at the request of the counsel for the intervening petitioners.

It is further stipulated that the testimony of the witnesses may be taken by a stenographer and reduced to typewriting, and that the signatures of the witnesses to their depositions be waived.

It is also stipulated by counsel that all objections to the materiality, competency or relevancy of the testimony of the witnesses be taken at this time to be passed upon at the trial of the cause.

Deposition of John Ballantine Niven.

John Ballantine Niven, a witness called on behalf of the said complainant, and residing at New York City, more than one hundred miles from the place where this cause is to be tried, being duly cautioned and sworn to tell the whole truth, and being carefully examined, deposes and says as follows:

Direct Examination.

(By Mr. GREEN.)

Q. Mr. Nevin, what is your profession?

A. I am a chartered accountant.

Q. With an office in this city?

A. With an office at 30 Broad street, New York.

Q. Have you had an occasion to make any examination of the books or accounts of the corporation known as the San Joaquin Electric Company? A. I have.

(Deposition of John Ballantine Niven.)

Q. When and where did you make such examination?

A. In April, 1900.

Q. Where? A. At Fresno, California.

Q. At the office of the company?

A. At the office of the company.

Q. As a result of such examination did you prepare a tabulation showing the financial condition of the company, in the nature of a balance sheet, as of December 31, 1898?

Mr. BUELL.—Objected to as incompetent.

A. I did.

Q. Have you such tabulated statement or balance sheet with you? A. I now produce it.

Mr. GREEN.—I ask that it be marked in evidence, dated as of this date.

Mr. BUELL.—I object to the introduction of the balance sheet on the ground that it is incompetent, immaterial, and irrelevant.

Balance sheet marked Complainant's Exhibit "A," of March 25th, 1901, etc.

Said balance sheet is in the words and figures following, to wit:

SAN JOAQUIN ELECTRIC COMPANY.

Balance Sheet, 31st December, 1898.

Liabilities:		
Capital stock authorized and issued:		
8,000 shares of $100 each	$800,000.00	
Less: In Treasury	10,000.00	$790,000.00
First mortgage 6% Gold Bonds, repayable 1935:		
Authorized: 1600 Bonds of $500 each	800,000.00	
Whereof certified and issued by the Trustees	555,000.00	
Less: In Treasury	31,000.00	524,000.00
Fresno Water Company		22,688.22
Bills Payable		17,089.20
Sundry Creditors:		
Accounts Payable	12,062.40	
Interests accrued and unpaid:		
On Bonds	$15,750.00	
On Bills Payable	556.00	16,306.00
		28,368.40
		$1,382,145.82

Assets.		
Franchises:		
As at 1st January, 1898		$800,000.00
Water rights, reservoirs, buildings and plant, including machinery, pipe and pole lines, etc.		
As at 1st January, 1898	$339,562.03	
Additions in 1898	15,945.80	
	$355,507.83	
Deduct: Depreciation on buildings and plant, say	11.000.00	344,507.83
Fresno Water Company, shares account:		
As at 1st January, 1898	$165,000.00	
Additions since	500.00	165,500.00
Horses, wagons and tools, etc.		2,067.45
Unexpired taxes		885.12
Accounts receivable		6.356.55
Cash in bank		1,188.35
Excess of liabilities over assets:		
As at 1st January, 1898, as adjusted	$34,255.54	
Add: Deficiency year 1898, per annexed account	27,384.98	61,640.52
		$1,382,145.82

[Endorsed]: Complainant's Exhibit "A" of March 25, 1901. P. Damm, Notary Public, Kings County, N. Y. Certificate filed in New York County.

(Deposition of John Ballantine Niven.)

Q. Have you also prepared a tabulated statement showing the profit and loss of this corporation for the year ending December 31, 1898? A. I have.

Q. Will you produce it?

A. I will. (Producing same.)

Mr. GREEN.—I ask that it be marked in evidence.

Mr. BUELL.—Same objection.

(Statement marked Complainant's Exhibit "B," of March 25th, 1901, etc.)

The said statement is in words and figures following, to wit:

Complainant's Exhibit "B" of March 25, 1901.

SAN JOAQUIN ELECTRIC COMPANY.

PROFIT AND LOSS ACCOUNT FOR THE YEAR ENDING 31st DECEMBER, 1898.

Salaries and wages	$14,797.60	Sales of light and power:	
Supplies and general expenses, including repairs	3,063.79	Ordinary consumers	$31,432.28
Carbons for arc lights	1,118.19	Hanford extension	1,500.00
Office expenses	190.63	Fresno water company	6,000.00
Legal expenses	624.15		$38,932.28
Taxes and licenses	1,902.30	Merchandise, excess of sales over purchases	673.62
Bad debts	535.47	Fresno Water Company—Dividends. (NOTE.—No dividends earned or declared.)	
Depreciation on buildings and plant	11,000.00	Balance, being loss transferred to Balance Sheet	27,384.98
	$33,232.13		
Interest:			
On bonds	31,500.00		
On bills payable and loans	2,258.75		
	$66,990.88		$66,990.88

[Endorsed]: Complainant's Exhibit "B" of March 25, 1901. P. Damm, Notary Public, Kings Co., N. Y. Certificate filed in New York County.

(Deposition of John Ballantine Niven.)

Q. There appears in Exhibit "A" a statement of excess of liabilities over assets amounting to $61,640.52. I will ask you to state whether or not that is a correct statement of the apparent condition of the company as it appears from the books of the company kept at its principal office in Fresno?

A. It is, subject to certain adjustments for the year 1898, which I made upon the figures as shown by the books.

Q. What were the nature of these adjustments, generally; I do not care for a detailed statement of it. Was it the transference of charges from one period to another?

A. The chief difference arises through the introduction of charges which were not on the books at all; I think that is a sufficient answer.

Q. Charges of what nature?

A. The chief charges referred to are for interest upon bonds and for depreciation; there are also a number of smaller charges for the transference of items which had been charged to construction upon the books and which were really profit and loss items; it doesn't seem worth while to state them more particularly just at present.

Q. By depreciation you refer to the item of $11,000, as shown in Exhibit "B"? A. I do.

Q. And that was for depreciation on the buildings and plant of the company?

A. Yes; it doesn't include any allowance for depreciation arising through the expiring of the franchise of the company.

Q. But is simply physical depreciation?

A. Yes; physical depreciation; that is a better answer.

(Deposition of John Ballantine Niven.)

Q. Then, with the exception of such transferences as were made on account of charges improperly made in your judgment to income account which should be properly made to capital account—

The WITNESS.—The other way, you have it turned around:

Mr. GREEN.—The other way?

The WITNESS.—Yes, the chief transferences I made were from the capital account to the income account, as they had been erroneously charged to capital account.

Q. With these exceptions then, that represents the financial status of the company as of the date of December 31, 1898?

Mr. BUELL.—I object to that both as to the form of the question and as calling for a conclusion of the witness, and on the ground that it is incompetent and irrelevant.

A. Yes, as indicated by the books, subject to the adjustments that I have referred to, applicable to the year 1898 particularly.

Q. In Exhibit "B" there is a credit under sales of $1,500 on account of "Hanford Extension"; was that money ever actually received by the Electric Company so far as appears from the books of the company?

Mr. BUELL.—If the witness knows.

Mr. GREEN.—If he knows; I asked him if it appears by the books.

A. No part of that money has been received, and the status of this transaction is that certain sums were advanced by parties in Hanford for the construction of a line to Hanford and in repayment of these sums the

(Deposition of John Ballantine Niven.)

gross earnings from the Hanford Extension were agreed to be left in the hands of those parties in Hanford until the debt is liquidated.

Mr. BUELL.—I object to the question because it is not shown that the witness has any knowledge of the matter, and I move to strike his answer out.

Q. Where did you get the information upon which you base this answer?

A. The information which I have just given, I gained from the exhibition either of the actual contract or of a copy of the contract between H. G. Lacy & Company in Hanford and the company.

Mr. BUELL.—I object, and also on the ground that it is shown that the witness' knowledge of this matter is mere hearsay.

Cross-Examination.

(By Mr. BUELL.)

Q. Mr. Niven, do you know whether or not you saw all the books of the San Joaquin Electric Company?

A. I have no reason to believe that any of the books were kept back.

Q. Answer the question—I asked you a question, give me an answer. A. My answer is I did.

Q. How do you know you did; how do you know that you saw them all?

A. From my knowledge of the books which a company of that nature would be expected to keep; there were exhibited to me all the books which one would expect to have exhibited; any book or document which I asked for was exhibited unquestioned.

Q. Then you simply judge that you saw all the books, because there were no books that you asked for that were not produced, is that right?

(Deposition of John Ballantine Niven.)

A. I should qualify my answer in this way: My first proceeding when I arrived at the office was—

Q. No, I didn't ask you that; you can explain that afterwards; please answer the question.

(Question repeated.)

A. I don't base my reply entirely upon the books.

Q. You are avoiding the question now?

A. No, sir; I want to tell you how I act—

(Question repeated.)

A. Not entirely.

Q. Under what other circumstances do you make this statement that you saw all the books of the company?

A. When I first arrived at the office of the company, I asked for a full list of the books of the company which were kept. This was furnished to me, and as far as I can remember anything that may have occurred to me as of omission was asked for and immediately produced.

Q. How do you know that all the books of the company were furnished you when you asked for a full list?

A. Well, as I have just said, I supplemented their reply with leading questions of my own which brought forth what I desired.

Q. Then, when you asked for all the books, you did not obtain them, did you, until you asked for further information of their books?

A. I would not like to say that I did not obtain them upon the first inquiry.

Q. Did you or did you not?

A. Excuse me, you are now asking me to make a

(Deposition of John Ballantine Niven.)

statement of circumstances which occurred some time ago.

Q. Statement of fact whether or not you made the request that you have testified to for all the books of the company—I ask you whether or not you got them?

A. May I speak off the record, Mr. Buell; is there any objection to my speaking off the record?

Q. I think you can answer that question, Mr. Niven?

A. You are trying to drive me into a corner—I want to explain that.

Q. I am simply asking you questions which, if incompetent, Mr. Green would object to.

A. My recollection is that I received everything that I asked for upon inquiry.

Q. When you requested all the books of the company, was that before you started the examination of the books? A. Undoubtedly.

Q. Now, before commencing the examination of the books, did you receive all the books of the company?

A. They were put at my disposal.

Q. They were put at your disposal? A. Yes.

Q. What do you mean when you say what information was missing you obtained by leading questions?

A. When I said that I intended to convey to you that it is my custom when I go to make an examination—

Q. I don't care what your custom is—what did you do in this instance?

Mr. GREEN.—Let him finish his answer.

Q. What did you do in this instance?

(Deposition of John Ballantine Niven.)

A. It is my custom to ask for a list of the books, which I take down. It very naturally occurs to me to get possession of the cash book, and I make this suggestion to them—"Have you got a cash book?" Their answer, of course, will be "Yes." I have now in my hands a list of the different books which I saw, and really cannot say whether the list was given to me without any prompting on my part or not. It all took place at one moment, and I answer generally that they gave me the books fully upon my making inquiry.

Mr. BUELL.—I move to strike out the answer of the witness, as not being responsive to the question, and as being incompetent, immaterial, and irrelevant.

Q. Then, as matter of fact, you cannot state positively, can you, that you did see all of the books, or all of the memoranda connected with this company, which would indicate its financial condition on the date which you have mentioned, namely, December 31, 1898?

A. I believe that I did see everything material.

Q. That is, you believe, do you know whether or not you did?

A. I will answer that in the affirmative; I do know that I received everything.

Q. How do you know?

A. I have already indicated what means I took to get the company's records brought before my notice.

Q. When you say that you know that you received all the books and memoranda affecting the transactions of the company which showed its financial condition, you

(Deposition of John Ballantine Niven.)

mean that you have no reason to believe that you did, isn't that right?

A. Yes; practically it is; I don't see much difference myself, but—

Q. But there could be a possibility of your not having seen all, couldn't there?

Mr. GREEN.—Objected to as immaterial and irrelevant.

A. I think so.

Q. That is what you think? A. Yes.

Q. You have stated that you made certain allowances for physical depreciation of the plant of this company (I believe it amounts to $11,000), is that right?

A. Yes.

Q. How did you arrive at that?

A. I arrived at that figure after careful consideration with the officers of the company, and particularly with Mr. Smith, the chief engineer of the company.

Q. Then, in arriving at that amount, you made this amount arbitrarily, from information—hearsay information, in regard to the physical condition of the plant, Mr. Niven?

Mr. GREEN.—Objected to on the ground that it calls for a conclusion.

A. Not entirely; I have some experience in making up accounts myself, and any information that I got from these people I used along with my own information and knowledge of the practice in such matters.

(Deposition of John Ballantine Niven.)

Q. That is, you made this amount conform to what you had observed, or had arrived at a conclusion in regard to, from other companies—other plants?

Mr. GREEN.—I object to the form of the question, as it is a statement of counsel which the witness is asked to confirm or deny, and is not interrogative.

A. I made it from the general experience which I have gained in the practice of my profession for some years.

Q. Did you make any physical examination of this plant?

A. I did not pretend to make any physical examination of the plant.

Q. Did you make any examination of the books of the company, such as you had at your command, for the year 1899?

Mr. GREEN.—Objected to on the ground that it is immaterial, incompetent and irrelevant.

A. I did.

Q. Did you prepare a balance sheet of the company showing its condition on December 31, 1899?

Mr. GREEN.—Same objection; also on the ground that all matters relating to the business or affairs of the company in the year 1899, were subsequent to date of the first default upon which the foreclosure action was based.

A. I did.

Q. Have you that balance sheet?

(Deposition of John Ballantine Niven.)

Mr. GREEN.—Same objection.

A. I certainly have it.

Q. Have you it with you?

Mr. GREEN.—Same objection.

A. I think you have a copy; I think I have a copy lying around somewhere; yes, I have it before me.

Redirect Examination.

(By Mr. GREEN.)

Q. Do you know anything more with reference to the questions propounded on cross-examination by counsel which you wish to explain in your answers?

A. I do not know that there is any necessity to explain anything.

Recross-Examination.

(By Mr. BUELL.)

Q. You made a report, did you not, Mr. Niven, to Mr. Street, representing the American Securities Agency?

Mr. GREEN.—Objected to as incompetent, immaterial and irrelevant.

A. I did.

Q. You were employed by him, were you not?

Mr. GREEN.—Same objection.

A. I was.

Q. Did you state in that report, Mr. Niven, that the question of the amount of depreciation to be charged was a somewhat difficult one and it might be desirable to obtain technical advice as to the adequacy of the sums which you had included in the account?

(Deposition of John Ballantine Niven.)

Mr. GREEN.—Same objection.

A. Yes, I did; that is a fact.

WITNESS.—In stating that I made the report, I should amend my answer by saying that Messrs. John A. Touch & Co., of London, made a report and that I made the examination for them, will that do?

Q. Did you prepare the report that is signed by Touch & Co.?

Mr. GREEN.—Same objection.

A. That is signed by John A. Touch & Co. Yes, I did.

Q. Mr. Niven, you state in this report that "that these accounts are not in exact accordance with the books of the companies as we found them"?

Mr. GREEN.—Same objection, and I object to any questions with reference to this report unless you are going to put it in evidence.

A. I did.

Q. What was the condition of affairs?

Mr. GREEN.—Same objection.

A. I refer you to what I stated in an earlier answer.

Q. Well, you did make that report, did you not?

Mr. GREEN.—Same objection.

A. Oh, yes.

Signature of the witness to the foregoing deposition is waived.

R. DAMM,

Notary Public, Kings County, N. Y. Certificate filed in New York County.

Deposition of Henry C. Deming.

Henry C. Deming, a witness called on behalf of the said complainant, and residing at New York City, more than one hundred miles from the place where this cause is to be tried, being duly cautioned and sworn to tell the whole truth, and being carefully examined, deposes and says as follows:

Direct Examination.

(By Mr. GREEN.)

Q. Mr. Deming, you are an officer of the Mercantile Trust Company, the complainant in this suit, are you not?

A. I am the vice-president.

Q. And have been such for how long?

A. Some four or five years.

Q. In the ordinary business of the Mercantile Trust Company, who has the principal charge of matters concerning what are known as railroad and corporate trusts?

A. I have with the secretary of the company.

Q. In the course of your duties are you ordinarily informed as to such trusts? A. I am.

Q. And of any proceedings taken to enforce them?

A. Yes, sir; I am.

Q. Do you know any of the bondholders of the San Joaquin Electric Company?

A. We were requested to take certain action under the mortgage by someone representing a large majority of the bonds?

Q. Was the name of the person whom you saw with reference to the matter, Mr. Charles F. Street?

(Deposition of Henry C. Deming.)

A. I think it was.

Q. You saw him together with myself? A. Yes.

Q. Do you recollect whether or not that request to foreclose was made by the American Securities Agency, Limited?

A. I think that is the name of the corporation which requested us to act.

Q. Except so far as you have been informed by the papers in this matter, have you ever been aware of any proceedings for the reorganization of this corporation, the San Joaquin Electric Company?

A. I have not.

Q. Have you ever had any conversation with any of the bondholders with regard to any reorganization of the company?

A. I do not recall any such conversation.

Q. Would you be likely to recall any such conversation in case The Mercantile Trust Company was asked to do or not to do certain things in connection with such proposed reorganization? A. I would.

Q. You do not recall any such? A. No, sir.

Q. Have you yourself, or has any other officer of The Mercantile Trust Company, or the corporation itself, so far as you know, entered into any arrangement or agreement for any reorganization of this corporation, or to represent any one class of bondholders as against any other class of bonds?

A. Not that I am aware of, and I should be likely to know if any other officer had done so; I have not done so myself.

(Deposition of Henry C. Deming.)

Cross-Examination.

(By Mr. BUELL.)

Q. The only person that you have seen representing the bondholders has been Mr. Street representing the American Securities Agency?

A. As I recall it, Mr. Street representing the American Securities Agency is the only person I have seen in connection with this business.

Q. Did he tell you anything about any scheme for the reorganization of this company?

A. I do not recall that he did.

Q. Would you be likely to remember if you had, do you think?

A. I cannot answer positively whether I had any conversation with Mr. Street with reference to any reorganization, but I do not think I did.

Q. Then you knew nothing at the time this action was commenced to foreclose the trust deed against the San Joaquin Electric Company of any scheme of reorganization proposed by Mr. Street or by the American Securities Agency?

A. No, I knew nothing of such reorganization; there was no arrangement made with the Trust Company for the deposit of the securities under the plan, and I had no knowledge, I can testify positively, as to any reorganization.

Q. Have the bonds been deposited with you?

A. I think not; no.

Q. Simply upon the request of Mr. Street you have instituted this proceeding?

(Deposition of Henry C. Deming.)

A. Upon the written request of the American Securities Agency, Limited, representing a majority of the bonds we instituted these proceedings.

Q. Did you ask for any further information in regard to the matter before commencing this suit?

A. I do not recall; we knew of the default in the payment of interest and were requested to enforce the penalty of the default by foreclosure.

Signature of the witness to the foregoing deposition is waived.

R. DAMM,
Notary Public, Kings County, N. Y. Certificate filed in New York County.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
THE SAN JOAQUIN ELECTRIC COMPANY,
Defendant.

Notarial Certificate.

United States of America,
Southern District of New York,
State and County of New York. } ss.

I hereby certify that on the 25th day of March, 1901, before me, Rudolph Damm, a notary public of the State

of New York, for Kings County, with certificate filed and authorized by law to act and acting in New York County, at my office No. 120 Broadway, in the city of New York (Borough of Manhattan), county and State of New York, personally appeared, pursuant to the notice hereto annexed, at 11 o'clock A. M., John Ballentine Niven and Henry C. Deming, witnesses named in said notice, and William W. Green, Esq., of counsel for the complainant, and Charles C. Buell, Esq., of counsel for the intervening petitioners, Alfred Young Chick and William Flanders Lewin, also appearing, and the said John Ballantine Niven and Henry C. Deming being by me first severally duly sworn to testify the whole truth, and being duly cautioned, and being carefully examined, deposed and said as appears by their depositions hereto attached.

And I further certify that the said depositions were taken down by me in shorthand and afterward reduced by me to typewriting, the signatures of the witnesses having been waived by counsel, and that the same have been retained by me for the purpose of sealing up and directing the same to the clerk of the court as required by law.

And I further certify that the reason why said depositions were taken was that the said John Ballantine Niven and Henry C. Deming are both residents of the city of New York in the State of New York, which is more than one hundred miles from the place where this cause is to be tried.

And I further certify that I am not of counsel or attorney to either of the parties, nor am I interested in the event of the cause.

And I further certify that the fee for taking said depositions, twenty dollars, has been paid to me on behalf of the complainant, and the same is just and reasonable.

In testimony whereof, I have hereunto set my hand and official seal of the city of New York (Borough of Manhattan), county and State of New York, this 26th day of March, A. D. 1901.

[Seal] R. DAMM,

Notary Public, Kings County, N. Y. Certificate filed in New York County.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
THE SAN JOAQUIN ELECTRIC COMPANY,
Defendant.

Notice to Take Depositions.

The intervenors, Alfred Young Chick and William Flanders Lewin, will take notice that the complainant, The Mercantile Trust Company, as trustee, will examine the following witnesses, to wit: Charles F. Street, Henry C. Deming and John Ballantine Niven, in the above-entitled cause under the Sixty-seventh Rule in Equity, as amended, before Rudolph Damm, at his office in the

Equitable Building, in the city of New York, county of New York, State of New York, on Wednesday, March 14th, 1901; beginning said examination at ten o'clock A. M. of said day and continuing from day to day until completed.

ALEXANDER & GREEN,
CHARLES MONROE,
Solicitors for Complainant.

Service accepted this 1st day of March, 1901.

WORKS & LEE,
Solicitors for Intervenors.

[Endorsed]: No. 916. Circuit Court of the United States, Ninth Circuit. Southern District of California. The Mercantile Trust Company, Complainant, vs. The San Joaquin Electric Co., Defendant. Notice of Taking Depositions. Chas. Monroe, Attorney at Law, Tel., Main 708, 402 Wilcox Bldg., Los Angeles; Cal.; Attorney for Complainant.

[Endorsed]: 916. U. S. Circuit Court, Southern District of California. The Mercantile Trust Company, as Trustee, against The San Joaquin Electric Company. Depositions of John Ballantine Niven and Henry C. Deming. Opened and filed June 20, 1901. Wm. M. Van Dyke, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant.
No. 916.

Conclusions of the Court upon Bill in Intervention.

In this case, the evidence does not connect complainant with the proposed scheme of reorganization set forth in the bill in intervention. The only testimony pointing to such connection is that of Mr. Coffin, and his testimony on this point is purely hearsay; while the vice-president of the Trust Company, Mr. Deming, who, together with the secretary of said company, had charge of matters concerning railroad and corporate trusts, such as the pending foreclosure suit, denies any knowledge of said scheme of reorganization, except such as has been imparted by the records herein. No other finding is possible than one in accordance with the testimony of Mr. Deming, and this, by the authorities cited below, is fatal to the intervention. (F. L. & T. Co. v. K. C. W. & N. W. Ry. Co., 53 Fed. 182; Clyde v. R. & D. R. R. Co., 55 Fed. 445; Toler et al. v. E. T. V. & G. Ry. Co. et al., 67 Fed. 168; 1 Foster's Fed. Prac. 333.)

The evidence, however, also satisfies me that there was no fraud or collusion between Seymour and Eastwood and the bondholders at whose request the pending suit was brought, in regard to said proposed reorganization. The positive testimony of both the parties named is against any agreement or understanding of the kind indicated, and there is nothing in the record to overcome their testimony.

Furthermore, the situation of the defendant company, and the causes of its financial embarrassment, are set forth by Mr. Seymour in his testimony, at pages 47, et seq., as follows:

"Q. To what do you attribute your inability to meet your obligation for the interest at that time.

A. A short answer would be, lack of funds, of course.

Q. Yes, but there were some reasons for a lack of funds. I would like you to explain what you understand to be the difficulty.

A. As I stated before, we were in business relationship with the Municipal Investment Company, of Chicago, who contracted with us to take bonds of us at eighty cents on the dollar. Well, they fell down on their contract with us before the plant was completed, and from that time on we were simply with an unfinished plant on hand, with large debts coming in from all sides. We were simply at our wits ends what to do, so we did the best we could all the time and were overwhelmed with debts all the time. * * *

Mr. COREY.—Q. Did the shortage of water have anything to do with this?

Mr. WORKS.—That is what I am about to get at.

A. When they fell down we were at sea, I was going to say. Our plant was incomplete. We couldn't furnish current to the consumers unless we made additional improvements, additional betterments, so that we were crowded on that account. Then the dry year came along and we had to shut down several months, and that also crippled us.

Q. If the dry year that you speak of had been an ordinary year and in the condition in which you found yourselves you would have been able to have met this interest, would you not?

A. Well, I am not prepared to state that.

Q. Well, what is your judgment about it?

A. We would have had a much better chance. We would have probably gotten credit so as to have borrowed money to proceed, but we probably couldn't have gotten it out of the direct revenues.

Q. Would it have lacked very much of meeting the obligations of the company if you had had an ordinary year, such as, for example we have this year?

A. We possibly would have pulled through.

Q. Did you explain that situation to Mr. Street?

A. Yes, we explained fully the entire position of affairs here, but we told him as far as we could see, in view of the condition of affairs, that we saw no means of avoiding a six month's default. In addition to our other troubles, we had a lot of floating indebtedness that I had personally made myself liable for, loans made on my personal assurance that they would be repaid.

Q. Have those been taken up since? A. Yes, sir.

Q. All of those? A. Yes, sir.

Q. When was the last of those paid?

A. They were generally paid before the six months default was made.

Q. You cleaned up all of those before the default in your interest?

A. The six months, yes, sir. There was some—I don't remember—some $10,000, probably, of that nature. The money was borrowed to pay the preceding six months' interest."

If there are any facts made prominent above others by this testimony, they are that the default in the interest due January, 1899, and the continuance of such default for six months, were owing to the inability of the company to pay, and were not the result of any conspiracy between the officers of said company and bondholders. Besides, it should be remembered, in this connection, that Seymour and Eastwood owned more than one-half of the capital stock in the Electric Company, the whole of said stock outstanding being $798,000, and, that, under the proposed plan of reorganization, $750,000 of capital stock was to be issued, and of this amount only $100,000 was to be turned over to Seymour and Eastwood. It is incredible, that these parties would wreck a solvent company, in which they owned more than one-half of the capital stock, in order to promote a re-organization, under which they would own less than one-seventh of the capital stock. It is true, as appears by a comparision of the proposed scheme of re-organization with the tabulated statement, or balance sheet, prepared by and made a part of the deposition of the witness Nivin, that,

under said scheme of re-organization, the par value of the capital stock was to be $40,000 less than the par value of the capital stock now outstanding, and the bonded indebtedness reduced from $524,000 to $432,000, yet the appreciation thus proposed of the capital stock would certainly be no adequate compensation to Seymour and Eastwood for permanently surrendering control of a solvent company to a new organization, and reducing the stock to be held by them, under said organization, to one-fourth of their present holdings. But, whatever may be said of their interests, the evidence, as I have already stated, fails to show, that Seymour and Eastwood, or either of them, participated in or consented to the proposed scheme of re-organization.

The order allowing the bill in intervention to be filed will be vacated, and said bill dismissed.

OLIN WELLBORN,
Judge.

[Endorsed]: No. 916. U. S. Circuit Court, Southern District of California. Mercantile Trust Co. vs. San Joaquin Electric Co. Conclusions of the Court upon Bill in Intervention. Filed September 3, 1901. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

At a stated term, to wit, the July Term, A. D. 1901, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom in the city of Los Angeles, on Tuesday, the third day of September, in the year of our Lord, one thousand nine hundred and one. Present: The Honorable OLIN WELLBORN, District Judge.

THE MERCANTILE TRUST COMPANY,
Complainant,
vs.
THE SAN JOAQUIN ELECTRIC COMPANY,
Defendant,
A. Y. CHICK et al.,
Intervenors.
No. 916.

Order Vacating Order Allowing Bill in Intervention to be Filed and Dismissing Bill.

This cause having heretofore been submitted to the Court for its consideration and decision upon the motion of the intervenors for an order requiring the receiver to apply all moneys received by him from the operation of the plant of the defendant over and above the necessary operating expenses, to the payment of the accrued and accruing interest on the bonds sued on in this action, until such interest is paid, and that this suit be continued until the same is paid, and satisfied by the

surplus earnings of the defendant company, and also upon the bill in intervention and the answers thereto, and upon the motion of the complainant that the Court vacate the order heretofore made herein, granting leave to A. Y. Chick & Company to intervene and become parties herein and to dismiss the petition and bill in intervention, and the Court having duly considered the same and being fully advised in the premises, now, on this 3d day of September, 1901, being a day in the July Term, A. D. 1901, of said Circuit Court of the United States, for the Southern District of California, the court files its written conclusions upon the bill in intervention and orders that the order allowing the bill in intervention to be filed be vacated, and said bill dismissed.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

MERCANTILE TRUST COMPANY,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant,
ALFRED YOUNG CHICK and WILLIAM FLANDERS LEWIN, Copartners Under the Firm Name and Style of A. Y. CHICK & COMPANY,
Intervenors.

Petition for Appeal and Order Allowing Same.

The above-named intervenors, A. Y. Chick and William Flanders Lewin, copartners doing business under the

firm name and style of A. Y. Chick & Company considering themselves aggrieved by the order and decree entered by said Court on the 3d day of September, 1901, in the above-entitled proceedings, dismissing their bill in intervention therein, do hereby appeal from said order to the United States Circuit Court of Appeals, and they pray that this, their appeal, may be allowed, and that a transcript of the record and proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

LEWIS A. GROFF,
WORKS & LEE,
Solicitors for Intervenors.

And now, to wit, on the 28th day of October, 1901, it is ordered, in open court, that the appeal be allowed as prayed for.

OLIN WELLBORN,
Judge of the United States Circuit Court.

[Endorsed]: Original. No. 916. U. S. Circuit Court, Ninth Circuit, Southern District of California. Mercantile Trust Company vs. San Joaquin Electric Company. Appeal. Filed October 28, 1901. Wm. M. Van Dyke, Clerk. Works & Lee, Rooms 420 to 425 Henne Building, Los Angeles, Cal., Solicitors for Intervenors.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

MERCANTILE TRUST COMPANY,
Complainant,

vs.

SAN JOAQUIN ELECTRIC COMPANY,
Defendant,

A. Y. CHICK and WILLIAM FLANDERS LEWIN,
Intervenors.

Assignment of Errors.

Now, come the above-named appellants, A. Y. Chick and William Flanders Lewin, by L. A. Groff, John D. Works, Bradner W. Lee and Lewis R. Works, their attorneys, and say that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

1. That the Circuit Court of the United States, Ninth Circuit, Southern District of California, erred in striking out from the bill in intervention of the appellants, on motion of the complainant, the following:

"Your intervenors further show to your Honors as follows: They admit that on or about the 1st day of July, 1895, the defendant made, executed and issued its certain sixteen hundred (1600) bonds, each for the principal sum of five hundred dollars ($500.00), and for the

principal sum in the aggregate thereof of eight hundred thousand dollars ($800,000.00), each bearing date the 1st day of July, 1895, wherein and in each of said bonds the said defendant, for value received, promised to pay to the bearer the sum of five hundred dollars ($500.00) in gold coin of the United States of America, of the then standard of weight and fineness, on the 1st day of July, 1915, at the office of the complainant, in the city of New York, together with interest thereon at the rate of six (6) per cent per annum, payable semi-annually in like gold coin, on the 1st days of January and July in each year, on presentation and surrender of the interest coupons attached to said bonds, as they severally should become due, said interest also being payable at the office of said complainant.

"They admit that in order to secure the payment of the principal and interest of said bonds, the said defendant on or about the 1st day of July, 1895, made, executed and delivered to the complainant as trustee a certain mortgage or deed of trust, dated on that day, wherein and whereby it granted, bargained, sold, assigned, set over, released, aliened, conveyed and confirmed unto said complainant and its assigns and successors, in trust, for the purposes in said mortgage set forth, the property described in the third paragraph of the bill of complaint herein, to have and to hold all such property and all other possession, franchises and claims acquired or to be acquired, and all other premises in said mortgage expressed to be conveyed and assigned unto the use of said complainant and its successors in interest, according

to the manner, terms and effect in said mortgage expressed, of and concerning the same for the benefit, protection and security of the persons holding the said bonds, or any of them; that said mortgage or deed of trust was duly recorded in the proper offices in the counties in which the property described therein and thereby conveyed, or intended so to be, was situated, a copy of which mortgage is annexed to and made a part of the bill of complaint herein.

"They admit that of the bonds provided to be issued under and secured by said mortgage or deed of trust, or intended so to be, eleven hundred ten (1110) bonds, numbered from one (1) to eleven hundred ten (1110) inclusive, for the principal sum in the aggregate of five hundred fifty thousand dollars ($550,000.00); were duly executed and issued by the said defendant, and were certified by said complainant as trustee under said mortgage or deed of trust, and that the same are now outstanding in the hands of bona fide holders thereof for value.

"They admit that in and by the said mortgage or deed of trust it was, among other things, provided that in case the said defendant or its successors should make default in the payment of any interest on any of said bonds, according to the tenor thereof, the payment thereof having been demanded according to the terms thereof, or should make a breach of any of the covenants or agreements in said mortgage contained by it to be done or performed, and such default or breach should continue for the period of six (6) months, that then and thereupon

the principal of all of said bonds then outstanding and unpaid might, at the election of the trustee, or at the request of one-tenth (1-10) of the amount of bonds then outstanding and secured thereby, become immediately due and payable.

They admit that in and by said mortgage or deed of trust, it was further provided that if the defendant or its successors should make default in the payment of the principal or any part thereof, or any installment of interest, or any part thereof, and such default should continue for the space of six (6) months after maturity and demand therefor, it should be the duty of the trustee, upon request and indemnification in said mortgage provided, to proceed in any proper court to foreclose said mortgage, and that the said trustee, the complainant herein, should be entitled to the appointment of a receiver and specific performance of all the covenants therein contained, and said trustee might, in case of default, apply to any court having competent jurisdiction, for instructions as to the matters not therein expressly provided for.

"They admit that on or about the 1st day of January, 1899, there fell due a semi-annual installment of interest upon said bonds represented by the coupons attached thereto, amounting to the sum of sixteen thousand six hundred fifty dollars ($16,650.00), which amount of interest the defendant refused and neglected to pay; but deny that payment thereof was duly or at all demanded, and that a like default occurred on the 1st day of July, 1899; but your intervenors allege that said default was the

result of collusion between the said defendant and its officers in charge of its business and the holders and owners of certain of the bonds of said defendant, and the same owners and holders of bonds who have caused this suit to be instituted, and for the purpose of bringing about an unnecessary re-organization of said company and its affairs to the detriment of your intervenors and other of the bondholders of said defendant not parties to said collusion or scheme of re-organization; and they further aver that the said defendant was fully able to pay the said installments of interest as they fell due, out of the earnings and funds of said company, and that no proper demand for the payment of said interest was ever made.

"They admit that the said default continued for a period of more than six (6) months, but deny that the complainant was requested by the holders of more than a majority of the bonds outstanding and secured by said mortgage or deed of trust, or intended so to be, under the power and authority given to it by said mortgage or deed of trust, to declare, or that the complainant elected or declared that the principal of all the bonds then outstanding and unpaid should become immediately due and payable, or that it served notice of such election upon the defendant.

"They deny that the defendant, San Joaquin Electric Company, is insolvent, or wholly or at all unable to pay its present or presently accruing indebtedness or liabilities or the interest on said bonds now due, or that the property covered by the said mortgage or deed of trust, or intended so to be, is slender or insufficient security for the payment of said indebtedness.

"They deny that in addition to the amount represented by the said bonds and coupons, the said defendant is indebted to sundry or divers persons in large sums, which debts, or any of them, have been incurred in the operation of the business of the said defendant, or which debts the said defendant is wholly or at all unable to pay.

"They deny that by reason of the insolvency of the said defendant, or for any other reason, it is necessary for the proper protection of the holders of the bonds and coupons secured by the mortgage or deed of trust given to the complainant, as aforesaid, that a receiver or receivers of the property of the said defendant, San Joaquin Electric Company, should be appointed, with the powers given to such receiver or receivers in like cases under the course and practice of this court, or at all.

"They admit that the matter in controversy herein exceeds five thousand dollars ($5,000.00), exclusive of interest and costs."

2. Said Court erred in dismissing the bill in intervention of the appellants in said action.

3. Said Court erred in holding that the evidence in the matter of the intervention of the appellants did not connect the complainant with the proposed scheme of re-organization, as alleged in the bill of intervention.

4. Said Court erred in holding that the testimony of the witness Coffin as to the said scheme of re-organization, and the knowledge thereof on the part of the complainant, was hearsay.

5. Said Court erred in holding that there was no fraud

or collusion between Seymour and Eastwood, officers of the defendant, San Joaquin Electric Company, and the bondholders at whose request said suit was commenced and prosecuted, with regard to the proposed re-organization of said defendant company.

6. Said Court erred in holding that the default in payment of interest by the defendant company, as alleged in the bill of complaint, was not on account of collusion between the officers of the defendant and the bondholders by whom said foreclosure proceedings were brought about, or their representatives.

Wherefore, the said A. Y. Chick and William Flanders Lewin pray that the decree and order of the said Circuit Court of the United States, Ninth Circuit, Southern District of California, dismissing the bill in intervention of the appellants be reversed.

LOUIS A. GROFF,
JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
Counsel for Appellants.

[Endorsed]: Original. No. 916. U. S. Circuit Court, Ninth Circuit, Southern District of California. Mercantile Trust Company vs. San Joaquin Electric Company. Assignment of Errors. Filed October 28, 1901. Wm. M. Van Dyke, Clerk. L. A. Groff and Works & Lee, Rooms 420 to 425 Henne Building, Los Angeles, Cal., Solicitors for Intervenors.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

MERCANTILE TRUST COMPANY,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant,
ALFRED YOUNG CHICK and WILLIAM FLANDERS LEWIN, Copartners Under the Firm Name and Style of A. Y. CHICK & COMPANY,
Intervenors.

Bond on Appeal.

Know all men by these presents, that we, Alfred Young Chick and William Flanders Lewin, copartners doing business under the firm name and style of A. Y. Chick & Company, as principals, and The American Bonding and Trust Company of Baltimore City, a corporation, having its principal place of business in the city of Baltimore, State of Maryland, having a paid-up capital and surplus of $1,300,000.00, duly incorporated under the laws of said State, for the purpose of making guarantee or becoming surety upon bonds or undertakings as required or authorized by law, and licensed by the insurance commissioners of the State of California, and having complied with all the requirements of the laws of said State of California regulating the formation

or admission of such corporations to transact such business in said State (C. C. P. 1056-57), as surety, are held and firmly bound unto the above-named plaintiff, Mercantile Trust Company, and the above-named defendant, San Joaquin Electric Company, in the penal sum of three hundred dollars ($300.00), to be paid to the said parties, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents, sealed with our seals and dated the 28th day of October, in the year of our Lord, 1901.

Whereas the above-named intervenors, Alfred Young Chick and William Flanders Lewin, copartners doing business under the firm name and style of A. Y. Chick & Company, have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the Judge of the Circuit Court of the United States, for the Ninth Circuit, Southern District of California, Southern Division.

Now, therefore, the condition of this obligation is such that if the above-named Alfred Young Chick and William Flanders Lewin, copartners doing business under the firm name and style of A. Y. Chick & Company, shall prosecute said appeal to effect and answer all damages and costs if it shall fail to make said appeal good, then

this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

A. Y. CHICK,
WILLIAM FLANDERS LEWIN,
By WORKS & LEE,
Their Attorneys.

THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY,
[Seal] By E. T. DUNNING,
Vice-President.

Attest: WM. DIETERLE,
Assistant Secretary.

Sealed and delivered and taken and acknowledged this —— day of ————, 1901, before me.

————————,
Notary Public.

Approved:

OLIN WELLBORN,
Judge.

[Endorsed]: Original. No. 916. U. S. Circuit Court, Ninth Circuit, Southern District of California. Mercantile Trust Company vs. San Joaquin Electric Company. Undertaking on Appeal. Filed October 28, 1901. Wm. M. Van Dyke, Clerk. L. A. Groff and Works & Lee, Rooms 420 to 425 Henne Building, Los Angeles, Cal., Solicitors for Intervenors.

At a stated term, to wit, the July term, A. D. 1901, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the city of Los Angeles, on Monday, the twenty-eighth day of October, in the year of our Lord one thousand nine hundred and one. Present: The Honorable OLIN WELLBORN, District Judge.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant,
ALFRED YOUNG CHICK and WILLIAM FLANDERS LEWIN, Copartners Under the Firm Name and Style of A. Y. CHICK & COMPANY,
Intervenors.
No. 916.

Order Allowing Appeal and Fixing Amount of Bond.

On motion of John D. Works, Esq., of counsel for Alfred Young Chick and William Flanders Lewin, copartners under the firm name and style of A. Y. Chick & Company, intervenors herein, it is ordered that the appeal of said intervenors, Alfred Young Chick and William Flanders Lewin, copartners under the firm name and style of A. Y. Chick & Company, from the order and decree entered by said court on the 3d day of Septem-

ber, 1901, in the above-entitled proceedings, to the United States Circuit Court of Appeals, for the Ninth Circuit, be, and the same hereby is allowed, and that a transcript of the record and proceedings and papers upon which said order and decree was made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit; it is further ordered that the amount of the bond to be given by the appellants be, and the same hereby is, fixed at three hundred (300) dollars, and that the bond in that amount tendered by the appellants, be, and the same hereby is, approved.

In the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Southern District of California.

THE MERCANTILE TRUST COMPANY, as Trustee,
Complainant,
vs.
SAN JOAQUIN ELECTRIC COMPANY,
Defendant,
ALFRED YOUNG CHICK and WILLIAM FLANDERS LEWIN, Copartners Under the Firm Name and Style of A. Y. CHICK & COMPANY,
Intervenors.
No. 916.

Clerk's Certificate to Transcript.

I, Wm. M. Van Dyke, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit,

in and for the Southern District of California, do hereby certify the foregoing three hundred and nineteen (319) typewritten pages, numbered from 1 to 319, inclusive, and comprised in one volume, to be a full, true, and correct copy of the record, pleadings, opinion of the Court, papers, assignment of errors, and of all proceedings in the Matter of the Intervention of Alfred Young Chick and William Flanders Lewin, copartners under the firm name and style of A. Y. Chick & Company, in the above and therein-entitled cause, and that the same together constitute the transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in said cause.

I do further certify that the cost of the foregoing record is $176.75, the amount whereof has been paid me by Alfred Young Chick and William Flanders Lewin, copartners under the firm name and style of A. Y. Chick & Company, the intervenors and appellants in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, this 12th day of December, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-sixth.

[Seal] WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

[Endorsed]: No. 782. In the United States Circuit Court of Appeals for the Ninth Circuit. Alfred Young Chick and William Flanders Lewin, Copartners Under the Firm Name and Style of A. Y. Chick & Company, Appellants, vs. The Mercantile Trust Company and The San Joaquin Electric Company, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the Southern District of California.

Filed December 16, 1901.

F. D. MONCKTON,
Clerk.

No. 782

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFRED YOUNG CHICK, ET AL,
APPELLANTS,

vs.

THE MERCANTILE TRUST COMPANY. ET AL,
APPELLEES.

APPELLANTS' BRIEF.

GEORGE E. CHURCH,
L. A. GROFF,
JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
Counsel for Appellants.

Dated, January, 1902. *Clerk*

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

A. Y. CHICK, et al,
Appellants,

vs.

MERCANTILE TRUST COMPANY, et al,
Appellees,

APPELLANTS' BRIEF.

This is a suit to foreclose a trust deed given to secure the payment of the bonds of the defendant company. The suit was brought by the trustee. The defendant company interposed no defense, but appeared, admitting the allegations of the bill to foreclose, and the president of the company was, by agreement of the parties, appointed receiver pending the foreclosure.

Subsequently, A. Y. Chick, et al, filed their petition for leave to intervene, setting up that they are owners of $38,000 of the bonds secured by the trust deed sued on; that the foreclosure of the trust deed was wholly unnecessary, and would result in a sacrifice of the property; that the said mortgage was being foreclosed, not for the purpose of collectng the money due the bondholders, but to bring about a re-organization of

the defendant company in the interest of a part of the bondholders, who had instigated the suit, and that the plan of reorganization, copy of which was made part of the petition, provided for the delivery of $100,000 of the stock of the reorganized company to the president and engineer and general manager of the defendant, in consideration of their facilitating the foreclosure.

The Court granted the petition for leave to intervene, (Record p. 59) and a bill of intervention was filed. (Record p. 60.) In this bill, in addition to the affirmative matters set up in the petition, which were included in the bill, certain allegations of the bill of complaint, including the allegations that the trustee had been requested by a majority of the bondholders to bring suit to foreclose the mortgage or trust deed, were denied. A motion was made to strike out these denials and all of the matter in the bill in intervention that purported to be or amounted to an answer to the bill of complaint. This motion was sustained, and all of the matter indicated stricken out. (Record p. 77), the Court holding that all we could do under our bill in intervention was to take evidence in support of our allegations tending to show collusion and want of good faith in bringing the action, thus showing the *right* of the bondholders to intervene and protect their own interests. This was in effect requiring us to prove the facts in support of our petition for leave to intervene, that had already been granted, and denied us the right to do what we intervened for, viz.: make proof against the foreclosure of the mortgage. This was to hold, in effect, that if we made proof establishing the necessity for the complaining bondholders to intervene, *then* they might plead in answer to the bill.

The evidence was taken upon the issues as thus formed upon the bill in intervention with all of the defensive matter con-

tained therein stricken out, thus depriving the intervenors, after having become such by order of the Court, of all right to prove any fact that would defeat the foreclosure of the bonds.

The following errors are assigned:

1. That the Circuit Court of the United States, Ninth Circuit, Southern District of California, erred in striking out from the bill in intervention of the appellants, on motion of the complainant, the following:

"Your intervenors further show to your Honors as follows: They admit that on or about the 1st day of July, 1895, the defendant made, executed and issued its certain sixteen hundred (1600) bonds, each for the principal sum of Five Hundred Dollars ($500.00) and for the principal sum in the aggregate thereof of Eight Hundred Thousand Dollars ($800,000.00), each bearing date the 1st day of July, 1895, wherein and in each of said bonds the said defendant, for value received, promised to pay to the bearer the sum of Five Hundred Dollars ($500.00) in Gold Coin of the United States of America, of the then standard of weight and fineness, on the 1st day of July, 1915, at the office of the complainant, in the City of New York, together with interest thereon at the rate of six (6) per cent. per annum, payable semi-annually in like gold coin, on the 1st days of January and July in each year, on presentation and surrender of the interest coupons attached to said bonds, as they severally should become due, said interest also being payable at the office of said complainant.

They admit that in order to secure the payment of the principal and interest of said bonds, the said defendant, on or about the 1st day of July, 1895, made, executed and delivered to the complainant as trustee a certain mortgage or deed of trust, dated on that day, wheren and whereby it granted, bargained, sold, assigned, set over, released, aliened, conveyed

and confirmed unto said complainant and its assigns and successors, in trust, for the purposes in said mortgage set forth, the property described in the third paragraph of the bill of complaint herein, to have and to hold all such property and all other possession, franchises and claims acquired or to be acquired, and all other premises in said mortgage expressed to be conveyed and assigned unto the use of said complaint and its successors in interest, according to the manner, terms and effect in said mortgage expressed of and concerning the same, for the benefit, protection and security of the persons holding the said bonds, or any of them; that said mortgage or deed of trust was duly recorded in the proper offices in the Counties in which the property described therein and thereby conveyed, or intended so to be, was situated, a copy of which mortgage is annexed to and made a part of the bill of complaint herein.

They admit that of the bonds provided to be issued under and secured by said mortgage or deed of trust, or intended so to be, eleven hundred ten (1110) bonds, numbered from one (1) to eleven hundred ten (1110), inclusive, for the principal sum in the aggregate of Five Hundred Fifty Thousand Dollars ($550,000.00), were duly executed and issued by the said defendant, and were certified by said complainant as trustee under said mortgage or deed of trust, and that the same are now outstanding in the hands of *bona fide* holders thereof for value.

They admit that in and by the said mortgage or deed of trust it was, among other things, provided that in case the said defendant or its successors should make default in the payment of any interest on any of said bonds, according to the tenor thereof, the payment thereof having been demanded according to the terms thereof, or should make a breach of any of the covenants or agreements in said mortgage contained by it to be done or performed, and such default or breach

should continue for the period of six (6) months, that then and thereupon the principal of all of said bonds then outstanding and unpaid might, at the election of the trustee, or at the request of one-tenth (1-10) of the amount of bonds then outstanding and secured thereby, become immediately due and payable.

They admit that in and by said mortgage or deed of trust, it was further provided that if the defendant or its successors should make default in the payment of the principal or any part thereof, or any installment of interest, or any part thereof, and such default should continue for the space of six (6) months after maturity and demand therefor, it should be the duty of the trustee, upon request and indemnification in said mortgage provided, to proceed in any proper court to foreclose said mortgage, and that the said trustee, the complainant herein, should be entitled to the appointment of a receiver and specific performance of all the covenants therein contained, and said trustee might, in case of default, apply to any court having competent jurisdiction, for instructions as to the matters not therein expressly provided for.

They admit that on or about the 1st day of January, 1899, there fell due a semi-annual installment of interest upon said bonds represented by the coupons attached thereto, amounting to the sum of Sixteen Thousand, Six Hundred Fifty Dollars ($16,650.00), which amount of interest the defendant refused and neglected to pay; but deny that payment thereof was duly or at all demanded, and that a like default occurred on the 1st day of July, 1899; but your intervenors allege that said default was the result of collusion between the said defendant and its officers in charge of its business, and the holders and owners of certain of the bonds of said defendant, and the same owners and holders of bonds who have caused this suit to be instituted, and for the purpose of bringing about an un-

necessary re-organization of said Company and its affairs, to the detriment of your intervenors and other of the bondholders of said defendant not parties to said collusion or scheme of re-organization; and they further aver that the said defendant was fully able to pay the said installments of interest, as they fell due, out of the earnings and funds of said Company, and that no proper demand for the payment of said interest was ever made.

They admit that the said default continued for a period of more than six (6) months, but deny that the complainant was requested by the holders of more than a majority of the bonds outstanding and secured by said mortgage or deed of trust, or intended so to be, under the power and authority given to it by said mortgage or deed of trust, to declare, or that the complainant elected or declared that the principal of all the bonds then outstanding and unpaid should become immediately due and payable, or that it served notice of such election upon the defendant.

They deny that the defandant, San Joaquin Electric Company, is insolvent, or wholly or at all unable to pay its present or presently accruing indebtedness or liabilities, or the interest on said bonds now due, or that the property covered by the said mortgage or deed of trust, or intended so to be, is slender or insufficent security for the payment of said indebtedness.

They deny that in addition to the amount represented by the said bonds and coupons, the said defendant is indebted to sundry or diverse persons in large sums, which debts, or any of them, have been incurred in the operation of the business of the said defendant, or which debts the said defendant is wholly or at all unable to pay.

They deny that by reason of the insolvency of the said defendant, or for any other reason, it is necessary for the proper protection of the holders of the bonds and coupons secured by

the mortgage or deed of trust given to the complainant, as aforesaid, that a receiver or receivers of the property of the said defendant, San Joaquin Electric Company, should be appointed, with the powers given to such receiver or receivers in like cases under the course and practice of this court, or at all.

They admit that the matter in controversy herein exceeds five thousand dollars ($5,000.00), exclusive of interest and costs."

2. Said Court erred in dismissing the bill in intervention of the appellants in said action.

3. Said Court erred in holding that the evidence in the matter of the intervention of the appellants did not connect the complainant with the proposed scheme of reorganization, as alleged in their bill of intervention.

4. Said Court erred in holding that the testimony of the witness Coffin as to the said scheme of reorganization, and the knowledge therof on the part of the complainant, was hearsay.

5. Said Court erred in holding that there was no fraud or collusion between Seymour and Eastwood, officers of the defendant, San Joaquin Electric Company, and the bondholders at whose request said suit was commenced and prosecuted, with regard to the proposed reorganization of said defendant Company.

6. Said Court erred in holding that the default in payment of interest by the defendant Company, as alleged in the bill of complaint, was not on account of collusion between the officers of the defendant and the bondholders by whom said foreclosure proceedings were brought about, or their repesrentatives.

As the case is now presented, the following questions are material:

1. Did the Court below err in striking out the portions of

the bill in intervention set out in the assignments of error?

2. Was the Company insolvent when the right to foreclose accrued?

3. Was there, or is there now, any necessity for the foreclosure of the trust deed for the protection of the bondholders?

4. Was there a plan and scheme to reorganize the Company and to foreclose the trust deed for that purpose, without regard to the necessity for such foreclosure for the protection of the bondholders?

5. Were the officers of the defendant Company, or any of them, parties to the scheme to reorganize?

6. Did such officers, in view of such proposed reorganization and the benefits to accrue to them thereby, allow the continued defalcation of more than six months, when they could have avoided it by paying the semi-annual interest charge maturing January 1, 1899, and which might have been paid at any time before June 1, 1899, and a foreclosure thereby prevented?

We will discuss these several questions separately.

I.

The Court below erred in striking out portions of the Bill in Intervention.

The intervenors had made their application regularly to intervene in the case, setting up as the reasons therefor that there was no necessity, in the interest of the bondholders, to foreclose the trust deed, and that such foreclosure had been brought about, and was being prosecuted by certain of the bondholders, for the sole purpose of bringing about a sale and sacrifice of the property described in the trust deed, and the acquisition thereof by the said bondholders, in opposition to the interests of the bondholders as a whole. The right to intervene was granted by order of the Court.

Record p. 59.

This being done, the intervenors became practically defendants to the acton. They were thus entitled to make any defense to the foreclosure of the trust deed that might have been made by any party made defendant to the bill originally. If not, there was no reason for making them parties at all. The issue as to whether they were entitled to intervene or not was presented by their petition for leave to intervene.

This issue having been passed upon in their favor, and they having been made parties to the suit, they had the undoubted right to plead any matter in their bill in intervention that would defeat the action on the part of the complainant. This being so, it was clearly error on the part of the Court below to strike out from the bill in intervention the allegations therein denying matters alleged in the bill material to the right of the complainant to recover. One of these was the denial of the fact that a request had been made upon the trustee complainant by the requisite number of bondholders to bring the suit. The allegation was a material one, and affected directly, not only the defendant in the action, but the minority bondholders whose rights were attempted to be protected by this very provision in the trust deed, that no suit should be brought by the trustee except upon the request of the number of bondholders named. There were other equally material averments in the bill that were put in issue by the portion of the bill in intervention stricken out by the Court. These parts of the bill having been stricken out, of course the intervenors made no proof in support of those allegations or denials in their bill in intervention. Notwithstanding this, the complainant undertook to show by one of the officers of the defendant trustee that such request had been made by the requisite number of bondholders. The evidence was clearly immaterial on their behalf, the intervenors having been deprived of the right to

make and sustain that issue by the striking out of that portion of their bill in intervention denying the allegation of such request. We respectfully submit that if there were no other question involved in this case, the decree of the Court below should be reversed on this ground alone.

II.

Was the Company insolvent when the right to foreclose accrued.

The question as to the insolvency of the Company must necessarily relate to the end of the six months after the first default in interest occurred, which would be July 1, 1899. The other side have treated the question as if it related to the time of the defalcation, which would be January 1st of that year. But no right of foreclosure could accrue to the bondholders until the defalcation had occurred and had continued for six months. Therefore, if the Company was solvent at that time, it is of no consequence whether it was so six months earlier or not. That this Company was solvent at the end of the six months, and could easily have paid the half yearly interest charge that fell due on January 1, 1899, before the end of the six months that entitled the trustee to foreclose the trust deed, there can be no sort of question. The figures demonstrate that fact beyond any doubt.

The testimony of Mr. Coffin, who was formerly a stockholder and officer in the Company, contains statements furnished him by the Secretary of the Company. Those statements can not be set out here, but Mr. Coffin's summing up of them shows the condition of the Company. With respect to the condition of the finances of the Company, he says:

"Q. From the figures shown in the statements furnished you of the condition of the Company *on July 1st or June 30th,*

1899, do those figures show the Company to be solvent or insolvent?

A. They show the Company to be solvent.

Q. Can you state on what you base your judgment as to the solvency of the Company?

A. The balance sheets submitted monthly, together with the statements in evidence show the Company to have a surplus income in excess of its expenses for the six months from January 1, 1899, to June 30, 1899, of $42,328.16.

Q. How much would it have required during that period to have met the interest on the bonds and to have prevented a foreclosure?

A. $26,250.00.

Q. What surplus would that leave over and above the amount required to meet the interest on the bonds?

A. $16,078.16."

Record p. 163.

In addition to this, he testified that Mr. Street told him, after an investigation of the condition of the Company, just before the reorganization scheme was agreed upon, that the Company was solvent.

Record p. 164.

If we look to the figures given by the Secretary of the Company, Mr. Collier, in his deposition, the same result will be obtained. His testimony shows that the Company earned the following surplus revenues, after paying all of its debts, not including the interest:

For the year 1897.....$10,878.80
For the year 1898..... 14,172.49,
For the year 1899..... 29,957.28,

making a total of surplus earnings for those years $55,008.57.

Record pp. 243, 244, 249, 305.

When asked what was done with that surplus revenue, the witness answered that it had been expended in construction. But the evidence shows, and that is an undisputed fact in the case, that the Company paid its interest on the bonds for 1897, and for the first half of 1898. Taking the semi-annual inter-

est charge, the amount would be $15,750.00. That was the amount falling due on January 1, 1899, and which must have been paid on or before July 1, 1899, in order to prevent a foreclosure. For that year, the surplus revenues of the Company were $14,173.49, as above stated. The half of that earned after the first half year's interest was paid would be half of the amount, or $7,086.74. If that had been applied, as it should have been, to the payment of the interest, there would have been but $8,663.26 still due. The evidence shows, as above stated, that for the year 1899 the surplus revenue was $29,957.28. Taking half of that for the six months within which the interest must be paid to prevent a foreclosure, the Company had earned a surplus revenue of $14,978.64. That was only $771.36 less than enough to pay that entire half year's interest. But as we have shown above, there was earned for the previous six months, a surplus revenue of $8,663.26, that was carried over, and should have been applied to the interest; so that the officers of the Company, if they had desired, could have paid all of the interest, and had remaining a surplus of $7,891.90 to be applied on the next half year's interest. With that $7,891.90, with the surplus earnings for the last half of the year 1899, viz: $14,978.64, the Company would have had a surplus of $22,870.54 with which to pay the half year's interest amounting to $15,750.00, and would, as the figures show, have had a large surplus to carry over into the year 1900, viz: the difference between $22,870.54 and the half year's interest.

There is no questioning these figures. They are admitted to be the actual earnings of the Company. The whole trouble is that this reorganization scheme, to be hereafter mentioned, intervened between the time the interest fell due and the end of the six months when it might have been paid, and by that intervention, the officers of the Company were offered a scheme

for permitting the foreclosure to take place. If we look to the accounts presented on behalf of the complainant, as testified to by their expert bookkeeper, Niven, it will be perfectly plain to the Court that the purpose of that account was to show the Company to be insolvent. It does not relate, however, to the proper time. It relates exclusively to the condition of the Company on the 31st day of December, 1898.

Record p. 323.

It does not take into account the increased revenues of the Company from $14,173.49 for the year 1898, to $29,957.28 for the year 1899, which would have shown that the revenues of the Company were increasing to such an extent that the interest could easily be paid. And in addition to this, in order to make the account appear as badly as possible, the account on the debit side has $11,000 charged up to depreciation, and also in the account of liabilities has $22,688.22 of indebtedness charged up as due the Fresno Water Company; neither of these items, which amount to $33,688.22, should have been carried into the account. The evidence shows that the Fresno Water Company was owned by the defendant, San Joaquin Electric Company; that it bought that entire property with $165,000 of its bonds.

Record pp. 227, 228, 229.

Therefore, the amount of money that the San Joaquin Electrc Company received from the Fresno Water Company could not create an indebtedness from the former to the latter, but was simply that much money received by the Electric Company that actually belonged to it. In other words, it should have been given as one of its receipts, instead of one of its debts.

These are the figures with respect to the financial condition of the Company at the time mentioned. No evidence is given to dispute them. No excuse for not applying this money to

the payment of the interest due is attempted to be shown. That the revenues of the Company have since increased, so that it is not only able to pay its interest, but all of its accrued and accruing debts out of its earnings, is an admitted fact. Indeed, it was broadly admitted by counsel on the other side at the argument in the court below that the Company was now solvent, and that it could pay not only the interest accruing, but within a short time the accrued and overdue interest. This being so, there must be something behind this foreclosure other than an honest effort to recover for the bondholders the money thus owing. This brings us to the next proposition.

III.

Was there, or is there now, any necessity for the foreclosure of the trust deed for the protection of the bondholders?

This proposition really needs no discussion. The revenues of the Company were increasing so rapidly before the interest had been due six months, that it must have been perfectly evident to any unbiased mind that the bondholders were perfectly secure, and would receive their interest without unreasonable delay. When the Company had a surplus of over $14,000.00 for the year that the interest fell due, and during the next year that surplus had increased to over $20,000.00, that should have been evidence enough to anyone desiring only to collect the money due to the bondholders that a foreclosure was wholly unnecessary. And the evidence shows that between the first day of January, 1899, and the first day of July of that year, Mr. Street, who was ostensibly acting for the majority bondholders, was in Fresno and investigated the condition of the Company. It is a significant fact that he went back to Chicago and told Mr. Coffin that the Company was solvent. That it was solvent there is no doubt, and Street

knew perfectly well, when he made that examination, and when the officers of the Company were making overtures to him for some share of the spoils in case of the reorganization, that this Company could, if it would, pay the interest before the end of the six months, and if he had wanted it, and demanded it, there is no doubt but that it could have been paid. But that was not what Street wanted. He could easily see that this was a valuable property, and as we shall show directly, negotiatons for a reorganization had commenced before the defalcation in the interest occurred at all, and within less than a month of that time the plan of reorganization had been prepared and practically agreed upon by the bondholders who were to participate in the benefits of the reorganization. But if this had not been so, the bad faith of the prosecution of these foreclosure proceedngs is made apparent now by reason of the fact that the evidence shows that since the foreclosure suit was commenced the revenues of this Company have run up to $80,000 a year, and that nearly $50,000 of that amount is surplus earnings after paying all of the operating expenses of the Company. $31,500.00 a year could be paid on the interest on the bonds as it fell due, and there would be nearly $20,000.00 of the surplus earnings to apply upon the back interest each year. With this showing, and the refusal of the complainant to suspend the prosecution of the case on our motion, it is made too clear for argument that the purpose of this prosecution is not to collect the money due the bondholders. This man Street is at the head of a wrecking company that engages in this reorganization business, and doubtless gets a large rake-off for its share of the spoils in bringing about the sacrifice of the property, by which the stockholders lose everything, and the bondholders get only a part of what is due them, and the American Sureties Company takes the balance. The bondholders we represent want nothing more

than their money. They do not want to become the stockholders of a reorganized company and take sixty per cent. of the amount of their present bonds drawing six per cent. in bonds of the reorganized company drawing only four per cent.; and when the Mercantile Trust Company persists in enforcing a foreclosure of a mortgage under these circumstances, it is simply acting in bad faith towards the bondholders, for all of whom it is trustee. Its simply duty is to make the money due the bondholders,—not to wreck the Company and sacrifice its property, or aid a part of the bondholders to reorganize the Company for their benefit. If the officers of this Company had, when it found itself unable to pay the semi-annual installment of interest, raised the rates for light and power, as it did after ths foreclosure suit was brought and the reorganization scheme all agreed upon, it would have had ample revenues with which to pay the interest within the six months. But that was not a part of the scheme. The first thing was to agree upon the reorganization and start the proceedings for foreclosure, and then make the property as valuable as possible for the benefit of the reorganizers. The whole scheme, from beginning to end, is a palpable fraud upon the right of all bondholders who are not seeking the reorganization, and it should not receive the aid of a court of equity, when the real facts are disclosed. And the Court can have no sort of doubt of the truth of these facts, and the bad faith of the whole proceeding, when it is considered that this man Street, who has been manipulating the whole thing, and was familiar with every fact and detail of the transaction, was not even called upon to testify. The testimony of Mr. Coffin connecting Street directly with the scheme to reorganize the Company, and that it was contemplated and talked about before any default in the interest at all, stands wholly undenied by Street, who could have disputed it if it was not true. The only claim they make with respect

to that matter is that the testimony is not competent, because Street's statement was only hearsay; but this is a mistake. It was not hearsay. Street, according to all the testimony, was acting for the bondholders who were charged in the bill in intervention with manipulating this property for the purpose of reorganization. What he said to Coffin was said directly in connection with and as a part of the negotiations then being carried on by him for that purpose. Therefore, his declaration was a declaration of a party in interest, and is not hearsay.

We need not enter upon a discussion of the figures or facts tending to show the present solvent condition of the Company. That it is now solvent and able to pay all of its debts, including the interest on its bonds, was admitted by counsel in the court below, and if it had not been admitted, it is shown by clear and undisputed testimony. So the evidence here shows that there was never any necessity for foreclosing this mortgage for the benefit of the bondholders, and that if there was at the time the suit was brought, the improved condition of the Company makes it unnecessary now; and there is no reason why this trustee should stand upon its strict legal right to foreclose this mortgage simply because there was a defalcation in one payment of interest, when it is clearly shown that it could get the money for the bondholders now without the foreclosure or sacrifice of the property.

IV.

Was there a plan or scheme to reorganize the company and foreclose the trust deed for the purpose, without regard to the necessity for such foreclosure for the protection of the bondholders?

We are impressed with the belief that no argument is necessary to convince the Court that there was a scheme for the

reorganization of this Company, or that the foreclosure of the trust deed is being prosecuted for the purpose of bringing about that reorganization. If this had not been so, they could have shown it without difficulty by taking the testimony of Mr. Street. All they do in that connection is to take the testimony of Mr. Deming, the vice-president of the complainant, Mercantile Trust Company, who testifies to nothing more than that he had no knowledge of any such reorganization scheme, or that the foreclosure was being brought for that purpose.

But his testimony shows that the Trust Company brought this suit simply because Street requested it to do so, and there is no evidence that Street had any authority from the majority of the bondholders to make such request; but conceding that he had, the fact still remains, as we shall show in a moment, that this reorganization scheme was conceived and entered upon before the default in the interest occurred, else Street would have been quick to deny it, and that the plan was all worked out and agreed upon long before this suit was brought. If we take the testimony of Mr. Coffin, it is quite convincing on that subject. He says in his testimony that he drew up a plan of reorganization early in January, 1899, and says, further:

"All the parties interested in the property were presented with the plan of reorganization which I drew up, *early in January*, 1899."

He gives the names of all of the persons taking part in the negotiations.

Record p. 155.

Street acted in person in these negotiations, representing other parties, and the others wer communicated with by letter.

Record p. 156.

He testifies distinctly that the first consultations over the

reorganization were held prior to the first defalcation in the interest.

Record p. 156.

And that the plan finally acted upon was prepared by Street, and was first contemplated in January or February of 1899.

Record p. 157.

And htat he, as one of the bondholders, received notice that the plan had been approved in London.

Record pp. 157, 158.

This plan of reorganization which he says Street informed him had been approved, is set out in his deposition at page 25, and is the same one set up in our bill in intervention and alleged to have been agreed upon by the parties.

Record p. 158.

Mr. Coffin testified further on this subject as follows:

"Q. Had you any conversation with Mr. Street in regard to this proposed plan of reorganization just shown you?

A. Yes sir.

Q. Was anything said as to whether or not that was presented to the bondholders in London?

A. Yes sir.

Q. Was anything said as to when it was presented to them?

A. Yes sir.

Q. When was it?

A. About the close of January or early in February, 1899. Mr. Street came here about January 20, 1899, and discussed my plan of reorganization, of which he expressed his entire approbation, but stated that he had been instructed by the London people, the American Sureties Agency, to proceed to Fresno and make a complete examination and report to London in person, if possible, which he did early in February, 1899."

Record p. 160.

Thus it is shown that the negotiations for the reorganization were entered upon prior to the default in the payment of the interest; that Coffin's plan was drawn and discussed between him and Street as early as January 20, 1899, or only

twenty days after the defalcation in the interest; that street was then on his way to Fresno to examine into the condition of the Company and report to the London people in person. The very fact that the transaction had gone thus far between Street and the London people, as early as January 20, 1899, is proof evident that they had considered this reorganization scheme before the interest fell due. Street did go to Fresno and make the examination, did report in person to the bondholders in London, and they did act upon this plan of reorganization as testified to by Coffin and not denied by anyone.

All of this occurred before the right to foreclose this mortgage accrued. Of course, no suit could be brought to foreclose the mortgage before the end of the six months, or July 1, 1899, and before that time came around, they had perfected their plans for the reorganization of the Company. Now, does this Court believe that if it had not been for this plan of reorganization so agreed upon between these parties, and considering the financial condition of the Company as it developed before the time for foreclosing the trust deed, that this foreclosure suit would ever have them brought for the sole purpose of recovering the amount due the bondholders? No, the court does not believe that the suit was brought, or is being prosecuted, in good faith by the people represented by Street. The Trust Company, the complainant, has simply permitted itself to be used by Street for his own purposes, without making any inquiries into the condition of things, which is the best that can be said for the Trust Company. But as for Street, whether the bondholders he represents are fully informed of the conditions or not, he has known for lo, these many months that the foreclosure of this trust deed was wholly unnecessary, and is without doubt prosecuting it for his own selfish ends.

V.

Were the officers of the company, or any of them parties to the scheme of reorganization?

It is perfectly evident that they were. The plan of reorganization itself shows that they were to have $100,000 of the capital stock of the reorganization company, provided they facilitated the foreclosure of the mortgage. That provision in the proposed plan of reorganization is as follows:

"Fourth—$100,000 of the capital stock will be insured to certain parties in Fresno for the water rights transferred by them to the old company, providing they facilitate the foreclosure of the mortgage."

Record p. 159.

The key to this provision in the plan of reorganization will be found in the testimony of Mr. Seymour, the president of the defendant company. He says:

"I will state that when Mr. Street was here in March or April, Mr. Eastwood and I, in a conference with him, after telling him that we knew no means by which the foreclosure proceedings could be prevented, the finances of the Company not materially improving, and the floating indebtedness being so much, we submitted to him as a matter of equity to put before the bondholders that we should be allowed—we asked that we be allowed some of the bonds of the new concern, in case of reorganization. We asked it as a matter of equity. That was the talk in our talk with him while here, asking him to present that to the bondholders as a matter of equity. We had devoted several years of our time here, and had worked at a very low salary, put in all our time at it, and we considered it a matter of equity. We considered it a good concern, and a matter of equity, we should have something in it along with the bondholders; and after he came back, he said that was the best he could do in the matter.

Q. Well, then, this proposal in the plan of reorganization grew out of that claim of yours that you should be allowed something?

A. Yes."

Record p. 273.

It should be remembered in this connection that before this

reorganization plan had been agreed upon, Street was endeavoring in Chicago to buy up the stock of the Company, as testified to by Mr. Coffin, with a view to reorganization. In that he seems to have failed. When he came on to Fresno, after seeing Mr. Coffin on his trip here to investigate and report to the people in London, he found that the officers and stockholders of the Company would have to be placated in some way, in order to bring them into line, and thus bring about the reorganization without opposition. This, it must be remembered, was long before the six months' defalcation had expired, and the testimony of Mr. Seymour is that at that time when he was here in March or April, he outlined in a vague way the plan of reorganization. He says:

"Q. When did you first hear anything about the proposed reorganization of this Company?

A. The first time I heard any definite statement in regard to taht matter was after we had defaulted six months on the bonds. I heard so in New York City. I saw that plan."

Record p. 270.

Here was the outcome of the previous claim made by Seymour and Eastwood that they should be allowed something in the reorganization. As the result of that claim, this clause referred to above, allowing them $100,000 of the stock of the reorganized company, was inserted in the plan, but upon the condition that these officers of the Company should facilitate the foreclosure. So the officers of the Company knew of the proposed reorganization long prior to the time when they might have paid the interest and prevented a foreclosure, and were resting upon their claim that they should have something in the reorganization, and with the promise of Street that he would do the best he could for them. Here they were placing themselves in an attitude antagonistic to their duties towards other stockholders. The very fact that they expected to participate in the reorganization to the exclusion of other

stockholders was a strong inducement to them to do just what this proposed plan required them to do, viz: facilitate the foreclosure; and when Mr. Seymour went to New York, this plan of reorganization was all prepared and agreed upon, and submitted to him. It may be important here to fix the exact time when Mr. Seymour went to New York. This is shown by a letter written by Mr. Collier, the secretary of the Company, to Mr. Coffin, and set out in his deposition. The letter bears date July 11, 1899, and will be found in Mr. Coffin's deposition at page . In this letter he says, in substance:

"Mr. Seymour is now in New York, called there by telegram from Mr. Street."

Record p. 153.

If Seymour was in New York on the 11th day of July, he must have been called there before or immediately after the six months within which the interest might have been paid had expired, and upon his going there, he was confronted with this plan of reorganization drawn up and agreed upon, in which he was to share in the benefits of the reorganization. Street not only submitted this plan of reorganization to him, but offered him the receivership during the foreclosure as a direct bribe for not opposing the foreclosure. His testimony on that point is as follows:

"Q. Were you asked at that time by Mr. Street or anyone else, to go into that plan of reorganization?

A. He made a proposition to me that he would ask to have me appointed received if I would make no formal defense or defenses as a stockholder or as president of the Company, against the foreclosure proceedings, and I declined to do so. Afterwards, he made a proposition that he would have the Mercantile Trust Company act, asking that I be appointed receiver, if I would agree to conduct it on ordinary business principles(and so I went in with no obligation whatever.

Mr. Corey—The only thing was that you would not charge more than a certain price?

A. Yes, my salary would not be more than a certain amount, providing the Judge granted me more than that as re-

ceiver. His idea was not to load it up with undue receiver's salary.

Mr. Works—Was that matter of reorganization ever taken up and acted upon by the local stockholders here?

A. It never was.

Q. Was any consent ever given by any of the local stockholders to tha or any other plan of reorganization?

A. Not that I know of.

Q. How much of the stock did you own at that time?

A. I owned a little over a quarter.

Q How much did Mr. Eastwood own?

A. The same amount.

Q And he and you together owned a controlling interest in the stock at that time?

A. Yes sir.

Q. And is that the condition at the present time?

A. It is."

Record p. 271.

There is no question, under this testimony, as to Street's bad faith. He was making a direct proposition to the president of this Company to buy him up for 100,000 shares of the stock of the re-organized company, not to make any defense to the foreclosure. Mr. Seymour says he declined to accept that proposition, but he did accept the receivership, and he did cause the company to enter its appearance in this case, admitted all the facs alleged in the bill, including the allegation that his Company was insolvent, and stipulated for his appointment as receiver of the Company during the litigation, and the decree of foreclosure would have followed without any defense having been made if the entervening stockholders had not interposed for their protection.

These are the facts as Mr. Seymour's own estimony discloses them. He knew perfectly that he was expected not to make this defense, and that he would, if he did not make the defense, receive, with Mr. Eastwood, the hundred thousand shares of the stock of the reorganized company, and Street knew it. Under such circumstances, a court of equity should

not be found aiding Mr. Street or the people he represents to foreclose this trust deed, and thus carry out a scheme conceived in iniquity and for the very purpose of wrecking this Company and sacrificing its property, and getting it into the hands of the reorganizers, leaving out the bondholders we represent, who, according to their testimony, were not consulted with respect to this reorganization, and received no notice of the purpose to bring it about. The only thing in the whole estimony relating to this question that would shield Mr. Seymour from the charges made that he was allowing himself to be used for the purpose of bringing about this foreclosure, is his bare statement that when the proposition was made to him he declined it. The evidence from beginning to end is consistent with the charge made, and wholly inconsistent with his innocence of an intention to bring about exactly that result, and save for himself his proportion of the 100,000 shares of stock in the new company; and nobody knew better than Mr. Seymour the value of those shares of stock, with the growing revenues and increasing value of the property of the Company. And when we consider the fact that the first proposition that Seymour and Eastwood should have some of the spoils of this reorganization came from Seymour himself, as early as March or April, 1899, and long before the six months had expired within which the interest could be paid, and the property saved from the foreclosure, it is conclusive evidence that the officers of the Company were not free handed and untrammelled in the performance of their duties towards the other stockholders, and the bondholders, with respect to thé litigation. We submit that upon this ground alone, the bill should have been dismissed; and if these bondholders can not get their interest under existing circumstances, let them bring their suit over again. The hardship would be none too great as a penalty for the course they have taken in this whole business. But we

have not asked even this of them. By our motion presented in connection with the hearing, we asked that the receiver be instructed to apply the surplus revenues that the Company is now making to the payment of the back interest, until the whole amount is paid. (Record p. 318.) Mr. Seymour, in his testimony, estimated that with the present revenue of the Company, which will doubtless increase, the whole thing could be cleared up inside of three years. The figures really show that it could be done in much less time. If the trustee and the bondholders who are threatening this foreclosure were acting in good faith, they would accept this proposition at once. It would bring to the test without delay the question as to whether the earning capacity of this Company is sufficient to make the payment of their interest sure. If it would, they have no reason to complain. Having refused t, there is every reason why the intervening bondholders here should be let in to protect their own interests, and that the decree appealed from should be reversed.

VI.

Did such officers, in view of such proposed re-organization and the benefits to accrue to them thereby, allow the continued defalcation of more than six months, when they could have avoided it by paying the semi-annual interest charge maturing on January 1, 1889, *and which might have been paid at any time before July* 1, 1899, *and the foreclosure thereby prevented?*

The quesion here presented has been answered by what has already been said. The evidence shows conclusively that the officers *could* have paid the interest within the six months, if they had desired to do so. That we have demonstrated by the figures set out above. Instead of doing so, they entered upon negotiations with Street, when he was here, in March or April,

to procure some of the spoils of the reorganization. According to he testimony of Mr. Seymour, they asked for some of the bonds. In the plan of reorganization they were allowed some of the stock, on condition that they should make no defense to the foreclosure. They did not pay the interest, as they could have done. They did not defend he foreclosure suit, as it was their duty to do, and they had held out to them and understood that they were to receive $100,000 in shares of the stock of the new corporation if they did not make the defense. Here are the facts. They are unanswerable. There has been no attempt to answer them by the testimony of the complainant. They simply asked the Court below to ignore these facts, and hold that they were entitled to the foreclosure of this trust deed on the purely legal ground that the interest having remained unpaid for six months, they were entitled to foreclose. But this will not do. The complainant, as a trustee, owes a duty to all of the bondholders secured by this trust deed. That duty is to collect the money due them—not to reorganize the Company. Here it is demonstrated that the money can be collected without doubt, without the foreclosure. It was demonstrated both to the Court below and to the trustee that the object and purpose of the foreclosure is the reorganization of the Company, and not to recover the money due to the bondholders. This should be enough to prevent the foreclosure. This is a court of equity, dealing with the acts of a trustee. The trustee should not be permitted by the Court to vary from its strict duty as such trustee. The minority bondholders have the same right to be protected that the majority bondholders have. It is as much the duty of the trustee to protect them as it is to protect the majority bondholders, and whenever it was disclosed to the trustee that this trust deed was being foreclosed, and it was being used for the purpose of foreclosing this mortgage, not for the purpose of collecting

the money, but for the purpose of reorganization, it should have dismissed its bill without being compelled to do so by the Court. Not having done so, the Court should act for the trustee, and order the dismissal of the bill. We submit that the case is clear and conclusive under the evidence, and that the bondholders we represent here are entitled, as a matter of equity, to have the decree reversed and the bill dismissed, so that they may receive their money.

Respectfully, submitted.

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NO. 782

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

Alfred Young Chick and William Flanders Lewin, Co-partners under the firm name and style of A. Y. Chick & Company,

Appellants,

vs.

The Mercantile Trust Company and the San Joaquin Electric Company,

Appellees.

Brief of Mercantile Trust Company, Appellee

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for The Mercantile Trust Company, Appellee.

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Appellees.

BRIEF OF THE MERCANTILE TRUST COMPANY.

Statement of the Case.

The bill was filed herein on the 12th of August, 1899, the defendant entered its appearance on October 2nd, and on June 13th, 1900, after several continuances, defendant, The San Joaquin Electric Company, filed its answer, in which none of the allegations of the bill were denied.

On October 30, 1899, and before answer of the defendant was filed or was due, a paper styled, "Petition

in Intervention, Bill of Intervention, and Notice of Motion to Intervene of Alfred Y. Chick and William Flanders Lewin, partners as A. Y. Chick & Company," was served upon complainant and defendant and next day upon the receiver. The notice was for the 6th day of November. The paper was not filed at that time, but on November 6th an order was made that the motion be continued for hearing until the next rule day. This petition for intervention was continued from time to time, and was finally filed on February 5th, 1900, and came on for hearing a few days subsequent. Objection was made that the petition was verified by counsel instead of by one of the parties and upon information and belief, and the court declined to allow the intervention on such a showing. The applicants took time to have their papers verified.

These proceedings are not shown in the transcript of record, but the complainant with the consent of the intervenors will file, if allowed by the court, a transcript certified by the clerk of the Circuit Court for the southern district of California, containing a transcript of the proceedings not contained in the printed transcript of the record.

On the 2nd day of April, 1900, a new petition in intervention was filed, which was verified in absolute terms by A. Y. Chick, one of the petitioners. The matter came up for hearing on the 9th of April, pursuant to notice given by the attorneys for the intervenors. [Transcript, p. 54.]

On the 23rd of April the court made an order allowing the bill in intervention to be filed and in the same

order denied the application of the complainant to file an answer to the petition in intervention which was presented on that day. The answer is found on pages 55–58 of the transcript and the order on page 59. The court took the position that the proper practice was for the complainant to join issue with the intervenors upon the bill in intervention and that testimony should be taken upon the issues presented thereby.

The paper filed in pursuance of the order was styled "Bill of Intervention and Answer of Alfred Young Chick and William Flanders Lewin," and a part of it purported to be an answer. [Transcript, pages 60–74.] Accordingly, on May 24th, 1900, the complainant moved to strike out so much as purported to be an answer, and particularly to strike out from and including line 9, page 2, to and including last line of page 5. The portion which the complainant moved to strike out is correctly copied in the assignment of errors on pages 352–357 of the transcript. The hearing of this motion was unavoidably delayed and was finally heard on the 4th of September, 1900.

The complainant filed its answer to the bill of intervention on the 4th of June, 1900.

After the pleadings were filed and settled, time was given to take testimony upon the questions raised by the bill in intervention and the answers thereto and this testimony was not completed until about the first of April, 1901.

The intervenors thereupon moved the court for an order requiring the receiver to apply all moneys received by him from the operation of the plant of the

defendant over and above necessary operating expenses to the payment of accrued and accruing interest on the bonds sued on in this action until such interest is paid and that this suit be continued until the same is paid and satisfied by the surplus earnings of the defendant company. [Transcript, p. 318.] The complainant moved the court to set down the hearing upon the bil in intervention and answers thereto, and afterwards moved the court to revoke the order allowing the bill in intervention to be filed, and the court set the hearing upon the bill in intervention and answers thereto and upon the testimony taken upon the issues presented thereby, and also upon the motions of the complainant and intervenors above mentioned. The motions of the complainant above referred to are not included in the printed transcript, but are set out in the additional transcript presented to the court.

The position taken by the complainant is and always has been that the bill of intervention should not have been allowed unless it was shown that the trustee had been guilty of fraud or neglect, and that that matter could not be shown by an *ex parte* application sworn to by one of the applicants, and that an opportunity should have been given the complainant to disprove the allegations of the petition before the bill in intervention was allowed to be filed, either upon an order to show cause why the bill should not be filed, or by affidavits, but the court, as above stated, took the position that the application to intervene being verified absolutely by one of the intervenors, the bill might be filed and issue joined thereon and testimony introduced by

both parties upon those issues the same as in a suit upon bill, answer and replication, and that is what was done and no testimony was taken except upon those issues and none was necessary because the answer of the defendant to the original bill did not deny any of the allegations of said bill.

ARGUMENT.

The first assignment of errors made by appellants relates to the striking out by the court of that portion of the bill in intervention which purported to be an answer. The action of the court was based upon the motion of the complainant. [Transcript, pp. 78-9.] The court will notice that three reasons were assigned for said motion: 1. Because no leave had been given by the court to file any answer; 2. Because it was irregular and improper for an answer and bill to be contained in the same paper; and, 3. Because the paper filed prayed for affirmative relief and no affirmative relief could be obtained by an answer. The motion was made on the 24th of May, 1900, but the decision was unavoidably delayed and the order allowing the motion was not made until the 4th of September, 1900, [Transcript, pp. 121-2] and the court in allowing the motion did not state upon what ground it was allowed, but, of course, if it was right to allow it on either ground, there was no error.

Referring to the paper itself [Transcript, pp. 60-74.] the court will notice that it is styled, "Bill in Intervention and Answer of Alfred Young Chick and William Flanders Lewin," and the intervenors in the introduc-

ory clause of the paper state that they file their bill of intervention and answer to the bill of complaint of the complainant, and then, after making the jurisdictional allegations, to show that the citizenship of the parties was such as to enable them to maintain their action both against the complainant, the defendant and the receiver, they start in with an answer to the original bill of complaint, and this answer continues from the middle of page 61 of the transcript to the middle of page 66, ending with the admission that the matter in controversy exceeds five thousand dollars, exclusive of interest and costs. From there on the allegations are affirmative and such allegations as may properly be contained in a bill, but are improper and irregular in an answer. The prayer, on page 73, like the rest of the paper, has a double aspect. So far as it is based upon the answer it is for a dismissal of the bill of complaint. So far as it based on the bill in intervention it is for affirmative relief. So that we not only have in the same paper both bill and answer, but the parties are different, the bill being against the original complainant and the original defendant and the additional parties, John J. Seymour and John S. Eastwood, and the answer being the answer of the intervenors alone against the original bill of the Mercantile Trust Company.

It has been decided that it is irregular to unite a cross-bill and an answer in the same pleading.

1 Foster's Federal Practice, 293;

Hubbard v. Turner, 2 McLean, 519, 540; 12 Federal Dec. 783;

Morgan v. Tipton, 3 McLean, 339-344, 17 Fed. Dec. 762.

And it is just as irregular to unite a bill of intervention and an answer in the same pleading. If it was proper at all for these parties to be allowed to intervene, it was because it was proper to make them defendants and if they were made defendants they of necessity would be permitted and required to file an answer which should be a paper by itself meeting the allegations of the original bill. If after being allowed to intervene and made parties defendant, they desired affirmative relief, they could obtain leave and file a cross-bill.

It is, of course, elementary that a defendant can obtain no affirmative relief against the plaintiff by an answer beyond what results necessarily from a denial of the prayer of the original bill.

1 Foster's Fed. Practice, 286;

Chapin v. Walker, 6 Fed. Rep. 794;

Ford v. Douglas, 5 How. 143; Bk. 12 L. Ed., 89;

Carnochan v. Christie, 11 Wheat., 446; Bk. 6 L. Ed., 516.

The intervenors never asked or obtained leave to answer the original bill, but took testimony with a view of proving the allegations of the bill in intervention.

It is apparent from the transcript that the purpose of the Circuit Court was not to give the applicants standing as defendants in the case, but simply to allow them to file their bill in intervention and have issue joined upon the allegations of that bill for the purpose

of determining whether the applicants were entitled to defend against the original bill or not

As early as November, 1899, the applicants for leave to intervene presented their first petition, which was also called a bill. Notice was given that on the 6th of November, 1899, they would apply for leave to file their petition and bill. Nothing was filed at that time, but the application for leave to intervene was continued from time to time until the 5th of February, 1900, when they did file the paper without any order, so far as appears from the record. This petition and bill were verified by George E. Church, one of the solicitors for petitioners, who simply stated that the allegations were true, so far as they related to his own acts, and so far as they related to the acts of others, he believed them to be true. As the paper verified did not purport to refer to his own acts at all, the verification was simply that he believed the allegations to be true. This paper came on for consideration on the 19th of February, and was continued to be called up on notice of the petitioners. The real reason for that continuance was that the court required the petition to be verified absolutely and by one of the applicants. Accordingly, on March 30, 1900, the solicitors for the applicants served upon complainant and defendant notice that on Monday, the 9th day of April, 1900, they would present to the court the petition for leave to intervene which is contained on pages 44 to 54 of the transcript. That petition was verified absolutely by A. Y. Chick on the 2nd of March, 1900, and was filed on the 2nd day of April. On the 23rd of April the complainant

filed its answer to the petition denying all its allegations, which answer is found on pages 55 to 58 of the transcript. This filing was without leave of the court, and the matter coming on the same day before the court, it was ordered that the application for leave to file said answer be denied and that the petition to intervene be granted. So that the bill in intervention was allowed to be filed without any opportunity being granted to the complainant to controvert the allegations contained therein, the idea being that the complainant should have an opportunity to controvert these allegations by pleadings directed to said bill.

After the portions of said bill purporting to be an answer had been striken out, the parties who were made defendants to said bill in intervention filed answers thereto which were found on pages 80, 94 and 108 of the transcript. No objection was made by the intervenors to that method of determining their rights, for they filed replications to these answers. [Transcript, pp. 105-108 and 119-120.] So that the issues were complete upon the questions raised by the bill in intervention, and upon those questions alone, and testimony was taken upon the issues made by those pleadings. In that connection attention is called to the order appointing the special examiner [Transcript, p. 197] which was made on motion of counsel for intervenors, and the examiner was appointed to take the testimony "in the matter of the intervention of Alfred Young Chick *et al.*" The hearing was upon the bill in intervention and answer and replication thereto, and the order made upon that hearing is the order appealed

from. So that it is clear that the purpose of the court all the time, after the petition for leave to intervene was granted, was to enable the parties to determine whether the intervenors were entitled to defend against the original bill or not, and this is evidently the understanding of the intervenors, because in the early part of their brief they complain that the court held that all they could do under the bill in intervention was to take evidence in support of their allegations, and that was in effect to require them to prove the facts in support of their petition for leave to intervene and to hold in effect that if they made proof establishing the necessity for the complaining bond holders to intervene, then they might plead in answer to the bill. They did not establish the necessity for the complaining bond holders to intervene and never put themselves in a position where they were entitled to answer the original bill. Of course, if the court had allowed the complainant to file answer to the original petition for leave to intervene and to present evidence in opposition to the allegations of the petition, then the whole matter might have been determined before the bill was filed, but the court chose to allow the bill to be filed without any opportunity to the complainant to offer proof to controvert its allegations, and then required the intervenors to prove their allegations and permitted the complainant to meet such proof and to have all those questions decided before the intervenors could plead to the original bill.

The portion of the bill which purported to be an answer was filed without leave and without any right, and the intervenors acquiesced in the order of

the court, for, as already stated, they made no application for leave to file an answer to the original bill and did not file any without leave. They were not precluded by the order of the court from asking leave to file such an answer, because the order of the court was simply that the matters complained of should be stricken from that paper which purported to be a bill.

Intervenors complain, in their brief, that they were prejudiced by the order, because it prevented them from proving that no request had been made upon the trustee by a majority of the bondholders to bring the suit, which was one of the matters covered by the denial stricken out of their bill. That they were not prejudiced will be amply shown by reference to that part of the paper which was not stricken out. They allege in their bill "that the said officers of said company and the said bondholders unlawfully and fraudulently conspired together to induce the complainant, the Mercantile Trust Company, as trustee, and its officers, to foreclose the said mortgage or trust deed by suit against said defendant company, with the object and purpose of carrying out said scheme for the reorganization of said company in the interest of said bondholders and of said officers of the defendant company; and in pursuance of said unlawful and fraudulent scheme, the officers of said company, having laid the foundation for the right of said trustee to foreclose said mortgage or deed of trust, or attempted so to do, *the said bondholders, for the purpose of bringing about said foreclosure and reorganization, and being sufficient*

in numbers to authorize them so to do, under the terms of said mortgage or trust deed, requested or caused the said trustee to be requested by their agent or agents to bring suit to foreclose the said mortgage and sell the property of the defendant company described therein, not for the purpose of enforcing the collection of the amount due from said defendant to its bondholders, but for the sole purpose of bringing about such reorganization of said company in the interests of the bondholders requesting such foreclosure." [Transcript, p. 68.] Again, it was alleged that the officers of the defendant company "did facilitate the foreclosure of said mortgage by fraudulently and purposely and unnecessarily allowing the interest upon the said bonds to become and continue delinquent for the term of six months, whereby the right of the said trustee to foreclose the same became and was perfect, according to the terms of said mortgage or deed of trust." [Transcript, p. 69.]

It is somewhat difficult to understand how intervenors can claim to have been prejudiced by not being permitted to prove that a majority of the bondholders did not request the trustee to bring the suit, when they allege and admit in the part of the bill not stricken out that such request was made.

Again, the purpose of the motion was not to prevent the intervenors from proving any fact, but to strike out from the paper filed, matter which they were not authorized to include in such paper, and which was irregular to be joined with their bill. The striking out of admissions from the portion of the bill purporting to be an answer, certainly would not hurt anybody.

The allegations which were stricken out are all, without exception, repeated in the allegations which remain. The denials would have been proper as allegations in their bill. For instance, if it was material and they could have proved that no demand for payment was made or that no request was made by a majority of the bondholders that the suit be brought, those were matters which they ought to have alleged to enable them to intervene, but there were allegations remaining in the bill under which the matter stricken out could have been proved if it had been capable of proof. Proof was not offered not because a part of the paper was stricken out but because no proof could be produced.

The intervenors discuss several questions in their brief which we will notice, but which we deem absolutely immaterial. For instance, what does it matter whether the company was insolvent or not when the right to foreclose accrued, or whether there was then or is now no necessity for the foreclosure of the trust deed for the protection of the bondholders. It is admitted that the company did not pay interest which became due on the 1st of January, 1899, and that the default continued for more than six months. Foreclosure suits are not brought because there may be a necessity for such suits, but because parties have a cause of action and right to enforce it. What difference does it make to the holder of a mortgage whether the defendant can not pay or can pay and will not. If his interest is not paid, and the mortgage provides for it, he has a right to bring his suit, and the suit, when it is brought, can not be dismissed or stayed because the

property increases in value or becomes more productive. When was it ever the law that a suit for foreclosure, properly brought, could not be prosecuted because after the bringing of the suit the defendant was in a condition to pay current interest and something on back interest, so that it might pay the back interest up in the course of a few years. If a defendant in a foreclosure suit, properly brought, can have the suit dismissed even upon a tender of all the interest, mortgagors generally would like to know it. In this, when the suit was brought, the right to bring it was absolute and complete, and at that time the company was insolvent to such a degree, that under the decision, herein cited, the right to a receiver was perfect. What the condition of the company is now, has no bearing upon the right of the complainant to a decree.

The only question that is important is whether the suit was the result of fraud or collusion, but inasmuch as the intervenors have laid such stress upon the claim that the company was not insolvent, and that there was no necessity for a foreclosure, we will discuss these matters; and, first, the

SOLVENCY OF THE COMPANY.

Upon this point counsel for intervenors state in their brief that the question as to the insolvency of the company most necessarily relate to the end of the six months after the first default in interest occurred, which would be July 1st, 1899, and that the other side have treated the question as if it related to the time of the defalcation on January 1st of that year. It is not

true that we have treated the question as if relating to the condition of affair on January 1st, 1899, but the issues would permit us to so treat it, for the allegations of the bill in intervention relate to that time. Referring to the bill in intervention we find the following allegations: "That on or about the 1st of January, 1899, there fell due a semi-annual installment of interest upon said bonds * * * which amount of interest the said San Joaquin Electric Company neglected to pay, although possessed of abundant means and resources so to do." [Transcript, p. 67.] "That in the month of January, 1899, the said defendant, the San Joaquin Electric Company, had and possessed ample means, income and resources to meet all of its just debts and liabilities due and to become due, including the accrued and accruing interest on all of its said bonds; but instead of applying its said means to the payment of its obligations, including the said interest, its officers and directors, including the said John J. Seymour and John S. Eastwood, conspired together for the purpose of diverting, and did unlawfully and fraudulently divert its funds to other purposes, and purposely and intentionally avoided paying the interest on said bonds, for the fraudulent and unlawful purpose of enabling certain of the bondholders of said company as hereinafter alleged, to bring and maintain a suit to foreclose the mortgage or deed of trust." [Transcript, p. 67.]

Thus it will be seen that the allegations are that the conspiracy took place in regard to the payment due on the 1st of January, 1899.

Again "said officers * * did facilitate the foreclosure of said mortgage by fraudulently and purposely and unnecessarily allowing the interest upon the said bonds to become and continue delinquent for the term of six (6) months, whereby the right of the said trustee to foreclose the same became and was perfect." [Transcript, p. 69.] "That it was contrived and agreed by and between the parties to this action and said bondholders, at whose instigation the said foreclosure proceedings were begun as aforesaid, that the said defendant company should default in payment of interest on its bonds." "That in pursuance of said conspiracy, the said defendant company failed and refused to pay the interest on its said bonded indebtedness as it became due, though possessed of abundant means and resources so to do." [Transcript, p. 70.] "That the said defendant, San Joaquin Electric Company, is and was at the time said default in the payment of interest occurred, solvent and possessed of ample property, income and resources to meet all of its just debts and liabilities, including the interest on said bonds, and said interest might have been paid and would have been paid out of the ordinary revenues and receipts of said company, but for the fraudulent conspiracy above set forth." [Transcript, pp. 72-3.]

This bill does not appear to have been verified, but practically the same allegations are made in the petition, and that was verified in absolute terms, as already stated by A. Y. Chick on the 2nd of March, 1900.

It afterwards appeared by the testimony taken by the intervenors that the defendant company was act-

ually insolvent and unable to meet its interest on the 1st of January, 1899, and therefore, after the testimony was taken, they changed their ground and referred the insolvency to the 1st of July, 1899, although the allegations in their bill were not directed to that time.

All the testimony shows that the company was insolvent and unable to pay its interest at both dates. Certain statements were sent by Mr. Collier, secretary of the company, to one Charles H. Coffin. These statements are found in the testimony of Coffin in the transcript, pages 133 to 151. He then gave the following testimony:

Q. You have examined the figures, have you, that were submitted to you by the officers of the San Joaquin Electric Company, as shown in the statements which were furnished you and which have been offered in evidence?

A. Yes, sir.

Q. From the statements furnished to you by the officers of the San Joaquin Electric Company, as to the condition of the company on January 1, 1899, which has been offered in evidence, do those figures show the company to be solvent or insolvent?

A. Solvent.

Q. From the figures shown in the statements furnished you of the condition of the company on July 1st or June 30, 1899, do those figures show the company to be solvent or insolvent?

A. They show the company to be solvent.

Q. Can you state on what you base your judgment as to the solvency of the company?

A. The balance sheets submitted monthly, together with the statements in evidence, show the company to have a surplus income in excess of its expenses for the six months from January 1, 1899, to June 30, 1899, of $42,328.16.

Q. How much would it have required during that period to have met the interest on the bonds to have prevented a foreclosure?

(Objected to by counsel for complainant as incompetent, irrelevant and immaterial.)

A. $26,250.00.

Q. What surplus would that leave over and above the amount required to meet the interest on the bonds?

A. $16,078.16.

Counsel for intervenors, in their brief, copy this testimony relating to July 1st, but do not copy that part of the testimony relating to January 1st; but one part of the testimony is as reliable as the other. Counsel say that the statements cannot be set out in a brief. That is true, but it can be easily shown that the statements do not bear out the testimony of Mr. Coffin. The argument of counsel for intervenors is based upon the fact that the testimony shows that in 1897 the net earnings of the company, not including the charge of $31,500.00 interest, were $10,878.80. For 1898 the net earnings, not including interest, were $14,173.49, and for 1899, not including interest, they were $29,-957.28, and they assume that all of these amounts were on hand, and do not take into consideration any of the debts of the company. Now then, the interest for 1897, amounting to $31,500.00, was paid, so that

the above amount of $10,878.80 was used up, showing that during the year 1807, $20,621.20 had to be borrowed or obtained in some way to pay that interest. The interest for the first half of 1898, amounting to $15,750.00, was also paid, and that amounted to $1577.51 more than the entire net earnings of that year, and it must be remembered that the net earnings of that year were nearly all during the first half of the year, as the drought in the latter part of the year prevented any net earnings. The total indebtedness, therefore, incurred for the payment of interest alone for the year 1897 and the first half of 1898, amounted to $22,198.71. These facts are shown by the statements presented in the testimony of Coffin, above referred to, and also by the statements in connection with the testimony of W. R. Price, also a witness for the intervenors. [Transcript, p. 202.] He also testified [Transcript, p. 202], "There has not been enough money collected in the years 1897, 1898 and 1899 to pay interest."

It appeared by the testimony of Mr. Seymour [Tr. pp. 231-233, 258-9 and 262] that there were other debts of the company besides interest, and that money had been borrowed, and that he had made himself personally liable for debts of the company, and also that the money had to be borrowed to pay the six months' interest preceding the default.

Returning to the statements sent to Mr. Coffin and contained in his deposition, those statements show as the Court will see upon reference to them, that during the year 1898 the operating expenses, including the interest on the bonds, were $55,432.41; that the re-

ceipts were $38,105.90, leaving a deficit of $17,326.51. In addition to that there were liabilities amounting to $50,741.02 to pay which their resources amounted to only $37,697.30, and this amount included $30,000.00 of bonds, all of which bonds were put up as collateral for debts of the company.

Among the statements sent to Mr. Coffin and included in his testimony was an estimate of the revenues and expenses of the company for 1899. According to that estimate the receipts would amount to $61,350.48 and the expenses to $59,561.00, but that estimate was not realized. Statement follows showing the monthly receipts from January to June, inclusive, 1899, and also the monthly disbursements. This statement shows:

Balance on January 1st,	$ 1188 35
Receipts from consumers during the 6 months,	25062 82
From banks, etc.,	5193 89
Amount due from city for which warrants were held,	2833 58
Amount from Hanford branch,	3600 00
Total receipts for the 6 months,	$37878 64

The disbursements during the 6 months were as follows:

January:	Expenses,	$ 2876 18	
	Loans repaid,	2100 00	
February	Expenses,	3025 62	
	Loans repaid,	2400 00	
March:	Expenses,	2469 00	
	Loans repaid,	4875 00	
April:	Expenses,	2285 14	
	Loans repaid,	1650 00	
May:	Expenses,	2964 67	
	Loans repaid,	1000 00	
June:	Expenses,	2849 98	
	Loans repaid,	5676 06	
Paid Hanford extension to apply on construction of same,		3600 00	
			37771 65
So that there was on hand on the 1st of July, 1899. only the sum of			$ 106 99

This statement of receipts and disbursements also contains a statement as to the Fresno Water Company, and if the receipts and disbursements of the two companies are taken together for the six months, the receipts from both only amount to $113.14 more than the disbursements. The trial balance as appears by Coffin's deposition [Tr. p. 144] also shows that on the 30th of June, 1899, there was only $106.99 in the treasury and that there were bills payable at that time amounting to $17,750.00, not including interest on bonds and not including any debts due to the Water Company. The statement introduced in evidence of the condition of the company on April 30th, 1899, shows that at that time the balance on hand was only $422.83.

The Court will see therefore that on July 1st, 1899,

the company was in no better position to pay the interest on the bonds than it was in January. The statements submitted by Mr. Coffin show all the disbursements and what they were made for. There is no pretense that the loans repaid were not for *bona fide* indebtedness properly incurred in the management of the company. The difficulty about the argument of counsel for intervenors is that they assume that each year stands by itself, and that all the net earnings were on hand and applicable to pay the interest on bonds when over $22,000 had to be borrowed to pay the interest for 1897, and the first half of 1898, and of course had to be repaid.

Testimony was taken in Fresno and statements made by Mr. Price and Mr. Collier were introduced in evidence there. It appears by intervenor's exhibits, attached to those depositions, [Tr. p. 310] that the

receipts for 1897 were	$41,491.11
Expenses, including interest,	$99,572.96
Deficit,	$58,081.85
In 1898 the receipts were	$39,044.48
Expenses, including a half years interest,	71,017.54
Deficit,	$31,973.06
For 1899 the receipts were	$49,140.56
Expenses, without interest,	64,644.36
Deficit,	$15,503.80

These statements also show that in 1897 the company borrowed $58,127.01. In 1898, $33,161.41. In 1899, exclusive of receiver's certificates, $7,752.38.

It is idle in the face of all these figures to claim that the company was solvent on the 1st of July, 1899, or that it could at that time have paid interest on the bonds due the preceding January. Mr. W. R. Price was a witness for the intervenors and he examined the books and papers of the company and made statements therefrom. He testified as follows: "There has not been enough money collected in the years 1897, 1898 and 1899 to pay the interest, that is, to pay the running expenses and fixed charges" [Tr. p. 202], and he made no claim that the company was solvent. He also testified [Tr. pp. 207-8] that his statement showed that the Electric Company on the 1st of January, 1900, owed $46,000.00 more than it had funds and assets on hand to pay at that time. Mr. Seymour testified that he attributed their inability to meet their obligations for interest to lack of funds; that they had been in business relationship with the Municipal Investment Company of Chicago, who contracted to take bonds at 80 cents on the dollar. [Tr. p. 258.] They fell down on their contract before the plant was completed, and from that time on "we were simply with an unfinished plant on our hands with large debts coming in from all sides. We were simply at our wits' ends what to do, so we did the best we could at the time and were overwhelmed with debts all the time. We made provision as soon as we could to pay interest on our bonds in addition to our other perplexities. That was paid out of the sale of bonds up to a certain time (pp 259). Our plant was incomplete, we could not furnish power to customers unless we made additional improvements,

additional betterments, so that we were crowded on that account. Then the dry year came along and we had to shut down several months and that crippled us. If that dry year had been a favorable season we would have had a much better chance to pay the interest. *We would probably have gotten credit so as to have borrowed money to proceed, but we probably could not have gotten it out of the direct revenues.* (pp. 261) If we had had an ordinary year such as this year, we possibly could have pulled through. I explained to Mr. Street the entire position of affairs here, but told him as far as I could see in view of the condition of affairs, I saw no means of avoiding a six month's default. In addition to our other troubles we had a lot of floating indebtedness that I personally made myself liable for, loans on my personal assurance that they would be repaid. Those have been taken up. They were generally paid before the six month's default was made. The money was borrowed to pay the preceeding six month's interest." (pp. 262.)

So that it appears from the uncontradicted testimony that the company was deeply in debt. They not only had used all of their revenues, but had also used up their credit which they probably could have continued had it not been for the dry year.

It is true that the receiver is now doing better and he testifies that in the course of a few years he might be able to pay the back interest.

Counsel for complainant did not admit, on the argument and it is not shown by clear and undisputed testimony, as stated in brief

of counsel for appellants, that the company is now solvent and able to pay all its debts, including the interest on its bonds. It does appear, however, and was so stated on the argument, that Mr. Seymour testified that the company is now earning enough to pay its current interest, and in the course of three or four years might pay the back interest, but that does not make the company solvent or able to pay its debts now, and no such admission was ever made.

The company was not only insolvent in fact, but it was insolvent within the decisions.

When a company is unable to pay its currently accruing interest it is actually, as well as technically, insolvent, and its property is inadequate security for its mortgage debt.

Central Trust Co. v. C. R. & C. R. Co., 94 Fed. Rep. 275, 282;

Dow v. M. & L. R. Co., 20 Fed. Rep. 260.

So that even if the company could pay its interest in the course of three or four years, it is now insolvent, but we are dealing with its present condition, and it certainly cannot be seriously claimed that the court has a right to compel us to abandon or postpone foreclosure proceedings, because under the wise and prudent management of the receiver the property is in better condition than it was when the suit was brought.

This question of the solvency or insolvency of the company is not important upon this intervention, unless it has been shown that there was fraud, incompetency or neglect on the part of the trustee, for when

the company defaulted in its interest, and the requirements of the mortgage were complied with so far as demand, etc., are concerned, the right to foreclose was complete, whether the default resulted from either inability or unwillingness to pay.

Bondholders will not be allowed to intervene in suits of foreclosure brought by trustees for their benefit where there is no fraud or neglect on the part of the trustees.

Richards v. C. & O. R. R. Co., 20 Fed. Cases 692; No. 11,771;

Skiddy v. A. M. & O. R R., 22 Fed. Cases 274; No. 12,922;

1 Foster, Fed. Practice, 333;

F. L. & T. Co. v. K. C. W. & N. W. Ry. Co., 53 Fed. 182;

Sands v Greely, 80 Fed. 195;

Clyde v. R. & D. R. R. Co., 55 Fed. 445;

Toler v. East Tenn. V. & G. Ry. Co., 67 Fed. 168.

The law is well stated by Goff, Circuit Judge, in the case of Clyde v. Richmond & Danville R. R. Co., 55 Fed. Rep. 445, 448, as follows:

> "It will not be presumed that the trustee will be unfaithful to the trusts confided to it, and it will be time enough to consider the question of making the bondholders or their committees parties for their own protection when the trustee fails to promptly and faithfully discharge its duties. It will not do to permit bondholders in such proceedings as this to become partners in their indi-

vidual capacity, or by committees, without showing why their interests will not be properly guarded by the trustees elected when the trust was executed, and then fully authorized to represent them. It would produce great trouble, cause endless confusion, and needlessly incumber the record, to permit the holders of bonds and coupons secured by mortgages to make themselves parties in foreclosure proceedings without assigning cause. The holders of bonds, coupons and stocks are constantly changing, and if they are proper and necessary parties to such litigation, it will be difficult to mature such cases for hearing; and in many instances, particularly in the courts of the United States, the jurisdiction of the court might fail or be questioned when the transfer of ownership was made.

"I think the rule is now well established that the individual bondholder and the separate beneficiary will not be made parties to suits relating to the mortgage or trust deed, unless it is alleged and shown that the trustee is incompetent, or for some reason cannot faithfully represent the *cestui que* trust."

The court will notice that the rule, as stated in that case, is that individual bondholders will not be made parties, unless it is alleged and *shown* that the trustee is incompetent, or for some reason cannot faithfully represent the *cestui que* trust.

In Richards v. C. & O. R. R. Co., 20 Fed. Cases 692 No. 11,771, it was decided that where trustees have undertaken by legal means to foreclose a mortgage, no bondholder has a right to proceed in his own name to foreclose, and he can ask the aid of a court of equity

only on the ground of unfaithfulness, neglect or inability on the part of the trustees.

The case of Skiddy v. A. M. & O. R. R. Co., 22 Fed. Cases 274, No. 12,922, is a very strong one against the right of bondholders to intervene in a foreclosure suit brought by trustees.

The portion of the opinion relating to the matter is found on pages 285-7. The bonds were owned about equally in Amsterdam and in London and the Dutch and English bondholders could not agree upon a plan of reorganization. The plan of the English bondholders had the approval of the trustees and the Dutch bondholders asked to be made parties to the suit. In denying the application, the court said:

The sole objection is that among the bondholders themselves there has arisen a dispute respecting the reorganization of the defendant company, and that the trustees or their counsel have, in consultation with such bondholders as they have had access to, given preference to the plan of one party of the bondholders rather than to that of the other. No allegation is made, however, that this preference has been expressed in any proceedings taken in court, or that it has influenced in any way the conduct of the suit on the part of the trustees.

Of course in every cause in equity all the parties in interest must be made parties to the suit; but in the case of Richards v. Chesapeake & O. R. Co. [Case No. 11,771], this court has already held that to foreclose a mortgage given by a railroad company to trustees to secure the payment of bonds and coupons mentioned in it, as they mature, the trustees are the only necessary parties to the suit; that the proper parties to be defendants are the parties who hold or claim in opposition to them, is equally clear. In order, therefore, to disturb the rights of the trustees to bring and conduct this suit, in which they represent every bondholder known to the mortgage, at the instance of such a bondholder, it must be shown to the court that the trustees have done, or contemplate doing, in the cause some act which will be detrimental to the interest of such bondholder or set of bondholders. This is not averred or proved in the matter of this petition. It is alleged that the trustees have approved a plan of reorganization proposed by one set of bondholders rather than another. But the court cannot consider any proceedings among the bondholders or trustees which are not the subject of proceedings in this court and this cause, so that until it is proved, as it is not now asserted, that the trustees under this mortgage, ought not, by reason of negligence, fraud, or incompetency, to conduct this suit, the petitioners havs no right to ask that they be appointed plaintiffs to share in

such conduct, or to conduct it wholly themselves I know of no instance in a case of foreclosure of a railroad mortgage where the trustees have been displaced or required to take an adjutant bondholder to assist in the conduct of a suit, except where some malfeasance or incompetency is alleged on the part of the trustee. But the petitioners ask in the petition, as amended, at once to be made parties, whether plaintiff or defendant, and cite numerous instances where the courts have allowed bondholders of different interests or classes, who though represented by the same parties, had or thought they had, different interests to be defended or asserted, from others represented under the same mortgage or deed of trust. It seems to me none of these cases apply to the matter of this petition. There is but one class of bondholders under this mortgage. The interests of each bondholder are identical Some of the bondholders have moved the action of the trustees and others have not. The one are active bondholders and the others are inactive. Some of them are represented by one committee and others are represented by another. but this does not constitute a class of bondholders; their interests are identical, and one might as well say that because bondholders under the same mortgage were represented in court by different counsel, that constituted them a different class of bondholders, and that they were, because represented by different persons, entitled to be parties to the suit.

The court further said: "The moment a petition is presented to this court by any party interested in the conduct or result of this suit, which alleges that these trustees are derelict, incompetent or partial in any action they propose to the court, that petition shall be, as it is entitled to be, respectfully heard, and if after consideration of the proof it shall be ascertainecd that the petitioner is correct, the trustees will be removed and the boldholders allowed to conduct the suit in their own way without the intervention of trustees, except so far as they may be nominal parties to it."

It will be seen that proof as well as allegations are required before a bondholder is allowed to intervene, and there must be a hearing. In this case the court adopted the plan of having a hearing the same as in an equity suit, and after that hearing decided that the bondholders had not proved any right to intervene.

Now then, has it been shown in this case that the trustee has been guilty of fraud or neglect or is incompetent or cannot faithfully represent the bondholders?

By reference to the bill of intervention it will be seen that the allegation was made that the defendant on the 1st of January, 1899, was possessed of ample means, income and resources to pay the interest falling due on that day and to meet all its debts and obligations due and to become due, including the accrued and accruing interest on all of its said bonds. It was further alleged that instead of applying said means to the payment of its obligations, including the interest, its officers and directors conspired together and diverted its funds to other purposes. [Tr p. 67.] It was further alleged that the officers of the company facilitated the foreclosure of the mortgage by fraudulently and purposely and unnecessarily allowing the interest upon said bonds to become and continue delinquent for the term of six months. [Tr. p. 69.] It is also alleged that it was contrived and agreed by and between the parties to this action and the bondholders at whose instigation the said foreclosure proceedings were begun, that the said company should default in the payment of interest upon its bonds, and that in pursuance to said conspiracy the defendant company failed and refused to pay the interest on its bonded indebtedness as it became due, though possessed of abundant means and resources so to do. [Tr. p. 70.] It was alleged that a plan for reorganization was conceived and inaugurated and the plan thereof determined upon before the default had been made in the payment of interest upon said bonds, or

any of them, and that if said plan and scheme of reorganization had not been determined upon, the officers of the company would not have allowed the interest upon said bonds to become delinquent. [Tr. p. 72.] A further allegation is made, [Tr. pp. 72-3], that at the time of said default in the payment of interest, the defendant was solvent and possessed of ample property, income and resources to meet all of its just debts and liabilities, including the interest on said bonds, and that said interest might have been and would have been paid out of the ordinary revenues and receipts of said company but for the purpose and intention of the officers of the defendant company and the bondholders to bring about a foreclosure of the mortgage and a reorganization of the company.

It will be noticed that all of the allegations of the bill are made with reference to the default occurring on January 1st, 1899, and that the default on that day occurred because of a proposed plan of reorganization, and that on that day the defendant was possessed of ample means to meet all of its just debts and obligations, including the interest upon its bonded indebtedness. There is no allegation anywhere in the bill that anything occurred subsequent to the 1st of January, 1899, to induce the continuance of a default or foreclosure proceedings, and nothing of that kind was heard of until the testimony was taken.

It has already been shown conclusively from the testimony taken by the intervenors that the defendant had no resources with which to pay the interest due either on the 1st of January or the 1st of July, 1899,

and further that the intervenors have utterly failed to prove that there was any fraud or neglect on the part of the trustee, the company, the bondholders, or anybody else.

It is admitted by counsel for appellants that the defendant was unable on the 1st of January, 1899, to pay the interest falling due on that date, but they claim that with what money there was at that time and what was on hand on the 1st of July, 1899, the defendant could on the 1st of July have paid the interest falling due on the 1st of January, 1899, and thus have prevented a six-months default of that interest, but no claim was made that the defendant could have paid the July interest when it fell due.

The evidence relied on to show that a plan of reorganization was agreed upon is that of the witness Coffin, but his testimony entirely fails to show such agreement. He testified that the first negotiations he knew of were begun in London in April, 1898, and were conducted by C. H. Coffin and William O. Cole, representing the San Joaquin Electric Company and Capt. Nares representing the Fresno Water Co., and contemplated the absorption of the San Joaquin Electric Company and the Fresno Water Company by the Fresno Canal and Irrigation Company. The American Securities Agency, Limited, were in no way interested in those negotiations. Mr. Coffin and Mr. Cole represented the stock of Seymour and Eastwood. Those negotiations were not carried through and they finally failed in December, 1898. [Tr. pp.154-5.] Even Coffin did not claim that the Mercantile Trust Company, the com-

plainant, ever knew or heard of those negotiations. The next negotiations he testified to were in January, 1899, when, according to him, the parties interested in the property were presented with a plan of reorganization which he drew up early in January, 1899. [Tr. p. 155.] He also testified that at that time the General Electric Company of New York was represented by Dr. Addison, their California agent; that Charles F. Street, of Street, Wykes & Co., represented the American Securities Agency, Limited, who claimed to represent a majority of the bondholders of the San Joaquin Electric Company. Mr. Elijah Coffin represented 43,000 of the bonds of the San Joaquin Electric Company and the British Linen Bank of London represented nearly half of the bonds of the San Joaquin Electric Company. E. H. Gay of Boston represented the bondholders of the Fresno Water Company, John J. Seymour and Mr. Eastwood holding a majority of the stock of the San Joaquin Electric Company, and Mr. Drexler of San Francisco, representing the owners of the Gas Company of Fresno. No meeting was held. Coffin drew up the plan of reorganization which was submitted to the parties. Mr. Street was in Chicago and consulted with Coffin about it. Mr. Elijah Coffin was there. The other interests were all consulted by letter. Those negotiations were first pending or contemplated early in January, 1899. There had been previous conversations with some of the parties interested with the same end in view. The first consultations and conversations were held prior to

the default in the interest on January 1st, 1899. [Tr. p. 156.]

Coffin does not testify what that plan of reorganization was, and we do not know a single one of its terms, but as he prepared it, he certainly would not say that it was improper or that it did not protect all parties interested, neither would he claim that charges of fraud or collusion could be predicated upon it. All he testifies to is that he drew up the plan of reorganization, consulted personally with Mr. Street and Mr. Elijah Coffin about it, and that the other interests were consulted by letter. There is no testimony as to what their replies were, or whether any of them agreed to it. It does not appear that it was in any respects similar to the alleged plan of reorganization set out in the bill in intervention. It will be noticed that at that time, according to Coffin, the American Securities Agency, Limited, claimed to represent a majority of the bonds of the San Joaquin Electric Company, but he also stated that Elijah Coffin represented $43,000.00 of the bonds and the British Linen Bank of London represented nearly half of the bonds, and there is no testimony that at any subsequent time those representations were in any way changed or that at any time the American Securities Agency, Limited, or Mr. Street, represented more than a bare majority of the bonds. Coffin's testimony is simply that the American Securities Agency, Limited, claimed to represent a majority of the bonds, but is positive that Elijah Coffin represented $43,000 of the bonds and that the British Linen Bank of London represented nearly half of them. He

does not say how he knows that the American Securities Agency, Limited, claimed to represent anything.

This testimony is important in connection with the claim made by counsel for intervenors in their brief that the Court can consider the hearsay testimony of Coffin as to what Street said, because it nowhere appears, even by hearsay testimony, that Street, or the American Securities Agency, Limited, ever represented the Mercantile Trust Company, the complainant, or anything more than a bare majority of the bonds.

The Court will also notice that Coffin testified, as above stated, that prior to the time when his plan of reorganization was drawn up in January, 1899, there had been conversations with some of the parties interested with the same end in view, and that the first consultations and conversations were held prior to the default on the interest on January 1st, 1899; but he nowhere states with which one of the parties those conversations were had, and from all that appears from the testimony they may have been held with the parties representing the Gas Company of Fresno or the General Electric Company of New York or with E. H. Gay representing the bondholders of the Fresno Water Company.

The witness Coffin was shown the original plan of reorganization contained in the bill in intervention and stated that it was prepared by Charles F. Street, endorsed by the American Securities Agency, Limited, and submitted to the bondholders of the San Joaquin Electric Company in London, and that this plan was first contemplated in January or February, 1899. He fur-

ther testified that he did not know whether the plan of reorganization grew out of or was connected with the conversation he had prior to January 1st, 1899, and as no one else testified that there were any negotiations prior to that time, that question may be considered disposed of. [Tr. p. 157.] Being asked how he knew it was presented to the bondholders in London, he stated that he himself was the holder of two bonds and received this plan from the American Securities Agency, Limited, and that his recollection was that the notice stated that they had considered it and approved of it in London. [Tr. p. 158.] He did not know of his own knowledge that it was submitted to any of the bondholders in London, and the notice which he claimed to have received was not produced and the alleged contents of that notice, of course, cannot be considered. But if, by any chance, his testimony could be considered at all upon this point, then it is to the effect that it was presented to all the bondholders in London, and the intervenors were London bondholders. The witness then testified as to conversations with Mr. Street in regard to the proposed plan of reorganization and stated that Mr. Street said it was presented to the bondholders in London at the close of January or early in February, 1899. He did not state when those conversations took place, but did say that Mr. Street came to Chicago about January 20, 1899, and that he and Coffin discussed Coffin's plan of reorganization, of which Mr. Street expressed entire approbation, but said that he had been instructed by the American Securities Agency, Limited, to proceed to Fresno and make a complete ex-

amination and report to London in person if possible, which he did early in 1899, as he told Coffin [Tr. p. 160]. It seems from this testimony that the alleged plan complained of could not have been under consideration between Mr. Street and Mr. Coffin when Mr. Street saw Mr. Coffin in January, 1899, because Coffin's plan was then under consideratin.

Mr. Coffin further testified that when this suit was commenced the Mercantile Trust Company had notice and knowledge that the purpose of the foreclosure was to bring about a reorganization of the company, and that Mr. Street had said something about the commencement of foreclosure proceedings depending upon agreeing upon a plan for the reorganization of the company [Tr. pp. 164–5]. On cross examination he said: "I would state from memory that Mr. Street informed me that the Mercantile Trust Company had knowledge of the proposed plan of reorganization before the suit was brought." [Tr. pp. 173-4.] He further stated, however, that he did not know of his own personal knowledge that at the time this suit was brought the Mercantile Trust Company had notice or knowledge that the proposed foreclosure was to bring about a reorganization; that he had no personal knowledge as to what the Mercantile Trust Company knew at the time it filed this suit about a plan of reorganization, except by hearsay. [Tr. pp. 174-5]. On re-direct examination he stated that his recollection was that he was informed by Mr. C. F. Street as to the knowledge of the Mercantile Trust Company that the foreclosure was brought for the purpose of affecting a reorganization of

the San Joaquin Electric Company and the Fresno Water Company,, but that consisted simply, according to his testimony, in a statement of Street that he had arranged with the Mercantile Trust Company to reduce the expense of foreclosure. [Tr. pp. 177-8.] He nowhere testified that Street had told him that he had informed the Mercantile Trust Company, or any of its officers, in regard to any plan of reorganization, or its purpose.

Right here it is proper to state that no matter who Mr. Street represented, it did not appear anywhere, even by hearsay, that he represented the Mercantile Trust Company, and he could not bind that company by his statement, nor could their knowledge be proved by hearsay testimony of anything that he had stated. His agency for anything was not proved by any competent testimony, and what testimony there was only showed him to have been the agent of the American Securities Company, Limited, and that agency only represented a bare majority of the bonds. The intervenors are the holders of only 78 of the bonds of the par value of $36,000, and they do not assume to represent the bonds testified by Coffin to have been represented by Elijah Coffin and the British Linen Bank of London. Neither was there any testimony that the American Securities Agency, Limited, represented at any time any of those bonds. The complainant represents all the bondholders, and whatever may be said about alleged statements of Street, they could not bind or affect the complainant nor the large minority of bondholders whom neither he nor the American Securities Agency, Limited, assumed to represent. But the

testimony was incompetent for any purpose and does not bind or affect anybody. No plan of reorganization or agreement for reorganization executed by anybody was presented to the Court and no attempt was shown to compel the production of any such paper and there was not a syllable of testimony that any such paper ever existed or that any such arrangement was ever completed. The plan, if it ever existed, being in writing, oral testimony, and especially hearsay oral testimony, is incompetent to prove that such agreement was made.

Coffin's own testimony in regard to this alleged plan of reorganization related to its supposed approval by the bondholders. He no where testified that he had any knowledge whatever about any agreement on the part of the officers of the company as to the plan of reorganization, or that he knew anything about their being connected with the plan of reorganization in any way and he did not attempt to swear that the plan of reorganization had been agreed upon between the Mercantile Trust Company or the bondholders and the company, and he did not swear that anybody had ever told him so.

More than all this, his testimony as to the time this alleged plan of reorganization was thought of must be false, because there was a meeting of the bondholders held in London in March, 1899, at which there were present A. Y. Chick, one of the intervenors, and his attorney, John Hart. Mr. Chick's deposition was taken by the intervenors and in that he stated that he attended one meeting, and one meeting only of the bond-

holders of the San Joaquin Electric Company, at the invitation of the American Securities Agency, Limited. He could not remember the date of the meeting, except that it was during the year 1899. [Tr. p. 190.] His attorney, John Hart, however, in his deposition stated that the meeting was about the end of March, 1899, and that that was the only meeting he attended. [Tr. p. 194.] So that it must be considered as certain the meeting was in March. Mr. Chick further testified that at that time no definite scheme of reorganization was submitted; that a scheme of reorganization was discussed generally, but it was in too crude a form for him to form any opinion in regard thereto; that he had never seen or read the proposed plan of reorganization set forth in the bill of intervention, and that a copy of it had never been sent to him, or his firm He further stated that he did not know whether any agreement had been made with Seymour and Eastwood to deliver to them any stock in the proposed new corporation. [Tr. p. 190-2.] Mr. Hart also testified that no definite scheme of reorganization was presented at that time, and that the only thing that took place was an informal discussion as to some scheme of reorganization. [Tr. p. 194.] At that time, therefore, the proposed plan of reorganization could not have been drawn up and Mr. Coffin is in error as to the time he received a copy of it, because the purpose of the meeting was to discuss some scheme of reorganization between the bondholders, and it is evident that no scheme of reorganization had at that time been

agreed upon, even among the bondholders, and if any scheme or plan had been proposed by anybody, no reason is apparent why it should not have been submitted at that meeting.

In connection with this testimony of Mr. Chick, we desire to call attention to the fact that he is the one who verified the petition for leave to intervene upon which the bill in intervention was allowed to be filed, and verified it absolutely, after the court had decided that leave to intervene could not be granted upon a petition verified upon information and belief, and in that petition it was stated absolutely that the plan or reorganization had been adopted. How Mr. Chick can reconcile this verification with the sworn statement in his deposition that he never saw the plan of reorganization and never heard it discussed, we leave it to him and the Court to determine.

Now Coffin having failed to testify as to any connection of the officers of the defendant company with the proposed scheme of reorganization, there is no testimony whatever, even hearsay, to connect them with it. The only testimony as to any connection of the officers of the defendant company with the proposed scheme of reorganization not hereinbefore referred to was the testimony of the witnesses Seymour and Eastwood, which was taken by the intervenors. Part of that testimony has been recited by counsel for appellants in their brief. The testimony of these witnesses was absolutely uncontradicted. Mr. Seymour stated that Mr. Street came to Fresno in March or April, 1899, with letters representing that he represented a majority of

the bondholders and wanted to look at the books of the company and investigate the state of affairs, and he did so; that was the only representative of the bondholders that he saw. [Tr. p. 258.] Coffin, therefore, must have been wrong when he testified that Mr. Street went to Fresno to make his examination and report to London thereon early in February, 1899, for according to Mr. Seymour, Mr. Street did not go to Fresno to make this examination until in March or April, and at that time the alleged plan of reorganization had not been thought of. At the time Mr. Street was out there Mr. Seymour explained to him the entire position of affairs, and told him that so far as he could see in view of the condition of affairs he saw no means of avoiding a six months' default. [Tr. p. 262.] He testified as follows: The first time I ever heard any definite statement in regard to the matter of reorganization was after we had defaulted six months on the bonds. I heard so in New York City. I saw that plan. I was on there. I talked with Mr. Street and it was shown to me. [Tr. p. 269.] This testimony is uncontradicted by anybody. Even Coffin does not pretend to say that Seymour or Eastwood, or anybody connected with the company, ever saw the plan of reorganization before that time.

Mr. Seymour further testified: I do not know where the idea of reorganization originated. When Mr. Street was out here (which was in March or April) he outlined in a vague way some reorganization under which he proposed to reduce the amount of indebtedness and after we saw him he went to England. It was while

they were in England, I understood, that the plan was elaborated. [Tr. p. 270.] Mr. Street was not here before our defalcation in the interest of January 1st, 1899.

I never saw him until after our first default actually occurred. He did not undertake to outline to me what the plan of reorganization was. He did not ask me to co-operate. He said he was not employed to do anything definitely. He was simply here finding out the condition of affairs so that he could go back and make a report. I first saw this proposed plan of reorganization in New York City sometime in July after the first six months default and after notice of demand for payment was made by the Mercantile Trust Company. That was after the first six months had expired. Mr. Street made a proposition to me that he would have me appointed receiver if I would make no formal defense as a stockholder or as president of the company against foreclosure proceedings and I declined to do so. [Tr. p. 271.] Afterwards he made a proposition that he would have the Mercantile Trust Company act, asking that I be appointed receiver if I would agree to conduct it under ordinary business principles, and so I went in without any obligation whatever. The only thing was that I would not charge more than a certain amount, provided the Judge granted me more than that as receiver's salary. The idea was to not load it up with undue receiver's salary. That matter of reorganization was never taken up and acted upon by the local stockholders here. No consent was ever given by any local stockholder to that or any other plan of reorganization that I know of. Mr. Eastwood and I owned a control-

ling interest in the stock and that is the condition at the present time. I presume the fourth clause in regard to the issuing of $100,000.00 of the capital stock to certain parties in Fresno refers to Mr. Eastwood and myself. That provision was called to my attention at the time I had the consultation with Mr. Street. [Tr. pp. 272-3.] And then he testified as set out in appellants' brief.

There was no testimony that the plan of reorganization was agreed to or ever consummated and Seymour testified that after he was appointed receiver there never was any further negotiations in regard to this plan of reorganization. He says: It has never come up again, and so far as I know if the foreclosure should result and this property be sold my interest would be lost entirely. I have no assurance that I will get anything out of it either in the way of capital stock in a new company if reorganized, or in any way. [Tr. pp. 274-5.]

Mr. Eastwood testified: I first heard of this proposed reorganization of the company in July, 1899. I do not know from whom that proposition came. I learned of it from Mr. Seymour. I did not have any talk with Mr. Street about it when he was out here on his first visit. I was not invited to join in that plan of reorganization. I suppose the clause with respect to allowing somebody in Fresno $100,000.00 of the capital stock referred to us, but I never heard it said. I know of nobody else so situated that it could have had reference to them. When I learned of the proposed reorganization I learned of that feature of it from Mr. Sey-

mour. No consent was ever given by me to the reorganization of the company in any terms. I do not believe myself there is any reason or necessity for the reorganization of the company. [Tr. p. 283.]

The testimony of these witnesses, who were called by the intervenors, was given fairly and there is no reason in the world for discrediting any of their testimony and there is not a particle of contradiction of it anywhere in the case.

The deposition of Henry C. Deming, Vice President of the complainant, was taken by the complainant, and he testified that except so far as he has been informed by the papers in this matter he has never been aware of any proceedings for the reorganization of the San Joaquin Electric Company; that he did not recall any conversation with any of the bondholders with regard to any reorganization of the company and that he would be likely to recall any such conversation in case the Mercantile Trust Company was asked to do or not to do certain things in connection with such proposed reorganization. He further testified that he had not entered into any arrangement or agreement for any reorganization of the defendant company or to represent any one class of bondholders as against any other class of bonds and that he should be likely to know it if any other officer of the complainant had done so. [Tr. p. 338.] On cross-examination he testified that at the time this action was commenced he knew nothing of any scheme or reorganization proposed by Mr. Street or by the American Securities Agency, Limited; that there was no arrangement made with the Mercan-

tile Trust Company for the deposit of the securities under that plan and that he had no knowledge as to any reorganization and that the bonds had not been deposited. [Tr. p. 339.] Mr. Deming at the beginning of his deposition stated that in the ordinary course of business of the Mercantile Trust Company he, together with the Secretary, had the principal charge of matters concerning corporate trusts and that in the course of his duties he was ordinarily informed as to such trusts and of any proceedings taken to enforce them, and that he was the one who saw Mr. Street when the demand was made for foreclosure. [Tr. p. 337-8.]

The court will notice upon an examination of the alleged plan of reorganization [Tr. p. 52] that it made no reference whatever to the Mercantile Trust Company, and there is no testimony that anything whatever has been done under said alleged plan. In the face of the testimony of Mr. Seymour and Mr. Eastwood that it never was agreed upon, and in the absence of any testimony that it was, it seems as if that plan was pretty effectually disposed of.

We have gone into the matter fully in view of a question of the Circuit Court at the close of the oral argument as to what would be the effect of the solvency of the defendant company on the 1st of July, 1899, in connection with the knowledge of the officers of the defendant company at that time of the proposed plan of reorganization, and the review of the testimony which has been made shows beyond question not only that the defendant company was not solvent and had no money

on hand with which to pay interest on the 1st of July, 1899, but also that at that time no officer of the company knew anything about the alleged plan of reorganization or had ever seen it. But if they had, it would make no difference, because the complainant was not connected with it in any way, and even in the hearsay testimony of Coffin only a portion of the bondholders are shown to have known anything about it, and that hearsay testimony was argumentative to the effect that it probably was sent to the other bondholders because it was sent to Mr. Coffin, who owned two bonds. Mr. Chick testified that his firm was the owner of 78 bonds and that they never saw it. [Tr. p. 190.] How many of the other bondholders never saw it we cannot tell. The chances are it was not in existence as a plan until sometime in July, because it was not presented at the meeting of the bondholders in London in March, and Mr. Seymour states that he never saw it at all till July.

In the case of Farmers Loan & Trust Co. v. L. N. A. & C. Co. Ry. Co., 103 Fed. Rep. 110, it was decided that a decree foreclosing mortgages on a railroad cannot be impeached because of a prior agreement between a committee of bondholders and officers and directors of the company to form a reorganized company, and purchase the property at the sale, and thereby relieve it from the unsecured debts of the company, even though it is a part of such agreement that stockholders of the old company may obtain stock in the new on payment of a small difference, where the mortgages are due because of default in the payment of interest, and the company is in fact insolvent, and it does not ap-

pear that the trustees who brought the suit are parties to or had knowledge of the agreement, or that the default which matured the mortgages was due to such agreement.

In the same case in answer to a charge that there was a fraudulent agreement between bondholders and stockholders, the Court said, [Tr. pp. 123-4], "But a more radical, and as it seems to me, fatal defect in the petition is the failure to allege that the trustees in the several mortgages participated in or knew of the wrongful purpose attributed to the bondholders' committee and the officers and directors of the New Albany Company; and, if the averment had been made, it would have been without support in the evidence. There being no question but that the mortgages foreclosed were valid and an installment of interest upon the bonds secured thereby overdue and unpaid when the suits were brought, no agreement, conduct or purpose, however fraudulent or wrongful, of Mills and the officers of the railway company, in respect to the proceedings of Mills or the bondholders' committee and the officers of the company or of any syndicate, could be ground for an attack upon the decree of foreclosure, *unless the trustees knew of the intended wrong and prosecuted the suits to a decree and sale for the purpose of aiding in its consummation*. And even in such case, unless it were shown that the holders of the bonds secured by the mortgage were also implicated in the scheme, on what ground or theory could equity interfere?"

In this case it is certain that the company defendant was absolutely insolvent on the 1st of January, 1899,

and that it was in no better condition on the 1st of July, 1899, except as appears by some of the statements presented by intervenors that it had paid some of its indebtedness. Mr. Seymour testified on cross-examination: I cannot state what the condition of the company was with reference to its debts over and above its assets on the 1st of January, 1899, when we defaulted in our interest. I will simply state that we had not the amount of funds on hand to meet the interest payment, nothing like, and by no means of financing could we collect enough.

Q. What efforts, if any, did you make towards securing the amount of money to pay your interest? [Tr. p. 301.]

A. I exhausted my credit six months previously. I had to borrow extensively then on my own personal assurance of repayment. [Tr. p. 302.] When we made default we could not borrow any more money of the Water Company because it did not have any more than enough to pay its own interest on bonded indebtedness. It was becoming gradually and is now in a position of being partially defaulted on its bonds by reason of attempting to bolster up the other company. [Tr. p. 303.]

Mr. Seymour testified absolutely that he never made any agreement not to make a defense to the foreclosure suit. [Tr. p. 271.] But what kind of defense could have been made? The six months' default had occurred and the trustee had a right to and was required to foreclose. There was no defense at the time

the suit was brought and there has never been any defense since.

On pages 16 and 17 of appellant's brief charges are made that the prosecution of this foreclosure suit is in bad faith. We do not understand that these charges are made against the trustee, and there is no foundation for them so far as the bondholders are concerned. If a right to a foreclosure has accrued, the Court cannot consider either the necessity for bringing the suit nor the motives which induced it.

Toler v. Tenn. V. & G. Ry. Co. 67 Fed. Rep. 168, 177.

That was a case in which the bonds were not due, and it was claimed in that case, as in this, that there was no reason why there should be a foreclosure, although there had been a default, and further, that the suit was brought in order to enable complainants, or somebody associated with them, to obtain the property at a low price. Commenting upon that, the court said:

> "If the minority bondholders have a legal right to have the mortgage foreclosed, which is hopelessly in default, none of these matters offer a material defense. * * * If they have sought to depress the market by the means described, their conduct is reprehensible; but I know of no authority for saying that thereby they have deprived themselves of their right of foreclosure, if any they have. * * * Whether complainants are conducting this suit from good or bad motives, for their own benefit or for the benefit of another, is immaterial. It is no defense to a legal demand instituted in the mode and according to the practice

of this court that the complainant is actuated by personal or improper motives. The motive of a suitor cannot be inquired into. Were it otherwise, nearly every suit would degenerate into a wrangle over motives and feelings;" and then cites from Farmers' L. & T.Co. v.G.B. & M.R.Co., 6 Fed. Rep. 111, as follows: "There are allegations to the effect that the object of Blair and Dodge and their associates was to obtain ultimate control of the mortgaged property, but the proceedings to foreclose the mortgage were necessarily public. The sale following the decree must likewise be public and open to all bidders. Confirmation of the sale by the court must of necessity also be open to the resistance of any party in interest, if the sale should not be fairly conducted, or if there should be such inadequacy of price as might involve a sacrifice of the property, or injury to the parties interested."

The same citation is also made, and the decision is followed and approved in Guardian Trust Co. v. White Cliffs Portland Cement & C. Co., 109 Fed. Rep., 530.

This suit was brought in good faith because complainant had a right and was bound to bring it. Everything required to be done before the bringing of the suit was done. It was proper for a receiver to be appointed, because the company was insolvent. There was not and could not be any defense to the action. The intervenors have not shown that the trustee has been guilty of any fraud, incompetency or neglect, or that they have any right to be heard, and the complainant is entitled to a decree as prayed for in its bill.

So far as the intervention is concerned, we submit that the Court properly decided that the order granting

the intervening bondholders leave to become parties be vacated and their bill in intervention dismissed.

Farmers' Loan and Trust Company v. K. C. W. & N. W. R. Co., 53 Fed. Rep. 182, 196. In that case it was stated by Judge Caldwell that,

> "If bondholders could become parties for the asking we should have as many parties to these suits as there are bondholders, and the Court would be compelled to listen in turn to the views of every bondholder on every question arising in the case. This is wholly inadmissible. Unless fraud or bad faith is alleged against the trustee, the individual bondholders will not be permitted to intervene, and will not be heard to complain of any action of the Court based upon the consent of the trustee acting in good faith.
>
> "The order granting these bondholders leave to become parties was improvidently made and will be vacated and their petition dismissed. The trustee is quite as capable of defending the estate against any unfounded claim as these bondholders, and it is apparent that it is acting in good faith in that regard."

Of course the same rule applies, in the absence of proof of fraud or bad faith, which applies in the absence of allegations of such fraud or bad faith. In this case there was absolutely no proof to justify intervenors becoming parties to the suit.

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for Mercantile Trust Company, Appellee.

NO. 782

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

Alfred Young Chick and William [illegible] Lewin, Co-partners under the firm name and style of A. Y. Chick & Company,

Appellants,

vs.

The Mercantile Trust Company and the San Joaquin Electric Company,

Appellees.

Motion to Dismiss Appeal and Accompanying Brief.

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for The Mercantile Trust Company, Appellee.

Filed January *190*

. . . . *Clerk*

[illegible] 1142 [illegible] J. [illegible]cer, Law Print[illegible], [illegible]-242 New High St

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

A. Y. Chick *et al.*,
Appellants,
vs.
The Mercantile Trust Company, *et al.*,
Appellees.

MOTION.

Now comes the Mercantile Trust Company, a corporation, and moves the Court to dismiss the appeal of Alfred Young Chick and William Flanders Lewin, doing business under the firm name and style of A. Y. Chick & Company, because the order from which said appeal was taken and allowed is not and was not an appealable order for the following reasons:

1. Because said order was not a final order, decision, judgment or decree.

2. Because said order was discretionary with the Circuit Court.

This motion will be made upon the Transcript filed in this Court.

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for Mercantile Trust Company, a Corporation, Appellee.

To Works & Lee, Lewis A. Groff, and Geo. E. Church, Solicitors for Appellants.

You and each of you are hereby notified that the foregoing motion will be called up for hearing before the United States Circuit Court of Appeals for the Ninth Circuit, on Tuesday, the 4th day of February, 1902, at the opening of Court on that day, or as soon thereafter as counsel can be heard, in the courtroom of said Court of Appeals, in the city and county of San Francisco, state of California.

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for The Mercantile Trust Company, Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

A. Y. Chick *et al.*,
Appellants,
vs.
Mercantile Trust Company
(a corporation) et al.,
Appellees.

Brief Accompanying Motion to Dismiss Appeal.

This is a suit to foreclose a trust deed given by the San Joaquin Electric Company to secure the payment of bonds. The complainant is the trustee under said trust deed.

After the bill was filed and before the answer of defendant was filed or was due, a paper styled "Petition in Intervention, Bill of Intervention, and Notice of Motion to Intervene of Alfred Y. Chick and William Flanders Lewin, partners as A. Y. Chick & Company," was served upon the complainant and defendant and the next day upon the receiver. The application was continued from time to time, and finally, on February 5th, 1900, the said petition was filed, but the application for leave to intervene was continued until February 19th, when objection was made by complainant that the peti-

tion was verified by counsel instead of by a party and upon information and belief. The Court required the petition to be verified by one of the parties. A new petition, verified absolutely by A. Y. Chick, was filed on the 2nd day of April, 1900, and the matter came up for hearing on the 9th of April. The complainant on the 23rd day of April asked leave to file an answer to the petition in intervention. The court denied the application to file an answer and allowed the bill in intervention to be filed and directed that issue be joined on that bill, so that the question as to whether A. Y. Chick & Company could intervene could be tried properly. The complainant, defendant and receiver, answered the bill of intervention denying its allegations, and when the issues were completed upon the bill in intervention, testimony was taken upon those issues alone, and the suit was set down for hearing and was heard upon those issues alone, and it was decided by the court that the order permitting A. Y. Chick & Company to intervene should not have been made and it was vacated.

A. Y. Chick & Company were bondholders and their claim was that the default in payment of interest was occasioned by fraud and collusion and that there was no necessity for a foreclosure. No claim was made that other bondholders were deriving any benefit in which they could not share, and there were practically no issues raised by that bill in intervention except as to whether the foreclosure suit was properly brought.

The defendant had filed answer to the original bill practically admitting the allegations contained

therein, but up to the time of the order vacating the leave to intervene there had been no hearing upon the original bill and answer. Subsequently a motion was made for decree upon the bill and answer and the suit has since gone to decree.

The act creating the Circuit Courts of Appeal provides:

> "That those courts shall exercise appellate jurisdiction to review, by appeal or writ of error, final decisions in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

It has been repeatedly held that an order refusing leave to intervene in a suit like the present one is not an appealable order. It was so held in the case of *Ex parte* Cutting, 94 U. S. 14; 24 L. Ed. 49, 51. In that case stockholders of a company against which a mortgage was sought to be foreclosed claimed that the officers of the defendant company were interested in the mortgage and did not intend to resist the foreclosure and therefore themselves asked leave to intervene. The motion was denied and the Supreme Court said that it "was only a motion in the cause and not an independent suit in equity appealable here."

In the case of Lewis v. Baltimore & L. R. Co.. 62 Fed. Rep. 218, it was decided that an order denying leave to intervene in a case was in no sense a final judgment and was not appealable. So much appeared by the syllabus. In the opinion it was stated that the party desiring to intervene was not a necessary party

and even were he a proper party, still this was within the discretion of the court.

In the case of Credits Commutation Co. *et al.*, v. United States, 91 Fed. Rep. 570, a party to whom permission to intervene had been denied sought to appeal and his appeal was dismissed because the order was not a final order from which an appeal would lie. The Circuit Court denying the leave to intervene ordered that "the prayers of the petitioners for leave to intervene herein be and the same are hereby denied, not as a matter of discretion, but because said petitions do not state facts sufficient to show that the petitioners, or either of them, have a legal right to intervene." Motion to dismiss was made on the ground that the order from which the appeals were taken was not a final judgment or decree from which an appeal would lie to the court of appeals, and upon the further proposition that the action of the lower court, in refusing leave to intervene was not reviewable on appeal, inasmuch as it rested in the sound discretion of the chancellor to admit or reject the intervention, and in that case the order of the court denying leave to intervene was made after a hearing. The practice in that case, and which seems to us the better practice, was upon presentation of the intervening petition, to order all parties in interest to show cause, on a day specified, why the prayer of petitioners for leave to intervene should not be granted, and the hearing was had in response to that order. The court of appeals decided that the order was not final, and stated further:

"Such orders not only lack the finality which is necessary to support an appeal, but it is usually said of them that they cannot be reviewed because they merely involve the exercise of the discretionary powers of the trial court."

An objection would have been made by complainant to the allowance of the appeal herein, if it had not been for the decision in the case of United States v. Philips, J., 107 Fed. Rep. 824. In that case an application for leave to intervene was denied, and the Circuit Court declined to allow an appeal, and the party asked for a mandamus. The court of appeals decided that inasmuch as there were two kinds of intervention—one belonging to the class of cases in which leave to intervene was entirely discretionary, and the other to that class in which the right was absolute, the correct practice for the chancellor, after refusing leave to intervene, was to grant an appeal, as a matter of course, and then for the party opposing the intervention to move for a dismissal.

The case at bar was one in which the matter was entirely discretionary.

Referring again to the case of Credits Commutation Co. v. United States, 91 Fed. Rep. 573, it is there stated:

"It is doubtless true that cases may arise where a denial of the right of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which the third party asserts some right which will be lost in the event

> that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief. The cases at bar, however, are not of that character."

Neither is the present case a case of that character, because the intervenors lose no right and do not lose their portion of the fund, but share with the other bondholders in whatever is derived from a foreclosure sale.

The same thing was decided in Hamlin v. Toledo R. R. Co., 78 Fed. Rep. 664, and in that case the appeal was allowed because the Circuit Court had gone on and decided that the parties desiring to intervene had no right to the fund and were not creditors, but the court of appeals said that the denial of an application to intervene was not a final decree, and that ordinarily no appeal would lie, and only allowed the appeal in that case because the decision was rendered by the Circuit Court, on the merits and the party, was thereby precluded from any right to the fund.

See also McLish v. Roff, 141 U. S. 661, 35 L. Ed. 893.

We submit, that for the reasons stated, the appeal should be dismissed.

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for Mercantile Trust Co.

No. 782

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFRED YOUNG CHICK, ET AL.,
APPELLANTS,

vs.

THE MERCANTILE TRUST COMPANY, ET AL.,
APPELLEES.

BRIEF OF APPELLANTS ON MOTION TO DISMISS APPEAL.

GEORGE E. CHURCH,
L. A. GROFF,
JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
Counsel for Appellants.

Filed January ....., 1902. _Clerk

BAUMGARDT, PRINT, 231 W. FIRST, L. A.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

A. Y. CHICK, et al,
Appellants,
vs.
MERCANTILE TRUST COMPANY, et al,
Appellees,

BRIEF OF APPELLANTS ON MOTION TO DISMISS APPEAL.

There is a motion in this case to dismiss the appeal, based upon the ground that the appeal is from an order refusing to allow the appellants to intervene. This is an error. The appeal is not from an order refusing to allow the appellants to intervene, but from a final decree dismissing their bill in intervention filed by leave of Court, which is quite another thing. The record shows that the appellants regularly filed their petition for leave to intervene.

Record p. 44.

The prayer of the petition was as follows:

"Wherefore your petitioners pray that leave may be granted to them to intervene in the said suit and to file such pleadings in intervention as may be necessary to bring before the court the facts relating to the matters set forth, and to protect the interests of the petitioners and other bondholders who are not parties to the scheme for the re-organization of the said corporation defendant, and to obtain such relief in the premises as may be just and equitable, and for such other or further order in the premises as to the Court may seem meet and proper."

Record p. 51.

To this petition, the respondents offered to file an answer making a formal issue upon the allegations of the petition. This the court below refused to allow, and upon the verified petition made the formal order allowing the appellants to intervene, as follows:

"This cause coming on to be further heard on the petition of Alfred Young Chick and William Flanders Lewin for an order allowing the said petitioners to intervene in said cause as prayed for in said petition, Chas. Monroe, Esq., appearing as counsel for complainant, and John D. Works, Esq., appearing as counsel for petitioners, and complaint by its said councel having applied to the Court for leave to file the anser of Mercantile Trust Company, to petition and bill in intervention of Chick, et al., it is now by the Court ordered that the said application for leave to file said anser be, and the same hereby is, denied; *it is further ordered that the petition of Alfred Young Chick, and William Flanders Lewis, for an order allowing the said petitioners to intervene in said cause as prayed for in said petition be, and the same hereby is granted, and the bill of intervention and anser of Alfred Young Chick and William Flanders Lewin is thereupon filed in said cause.*"

Record p. 59.

It will be seen by the petition, with its prayer, and the order of the court made, that the petitioners be allowed to intervene as prayed for, that the intervention was regularly allowed by order of the Court, and that in conformity to the order of the Court they filed their bill in intervention. Thus the case had passed the stage of a mere application for leave to become parties, and the appellants had, by express order of the Court,

been made parties to the suit, with the right as prayed for in their petiton to file such pleadings as might be necessary to protect the interests of themselves and other stockholders. The bill in intervention will be found commencing on page 60 of the Record. The prayer of the bill is as follows:

"Wherefore, your intervenors pray your Honors that the bill of complaint herein be dismissed; that the receiver, John J. Seymour, appointed by your Honors, be discharged; that he be ordered and directed to immediately account to this Court for his management of the property of the defendant Company, and pay over all funds received by him as such receiver; that said John J. Seymour, as the President of said defendant Company, be required to apply the receipts and revenues of said defendant to the payment of the interest accrued upon the bonds described and set forth in the bill of complaint herein; that the said John J. Seymour and John S. Eastwood and said defendant company be perpetually enjoined from carrying out the scheme of re-organization set forth, or any reorganization of the said Company, and for such other relief in the premises as may to your Honors seem just and equitable."

Record p. 73.

This was followed by a motion on the part of the complainant to strike out part of the bill in intervention.

Record pp. 77-78.

This motion was granted, which is one of the grounds upon which our appeal is urged in this case. The complainant and the defendants, San Joaquin Electric Company, John J. Seymour and John S. Eastwood, regularly filed their answers to this bill in intervention.

Record pp. 80, 94, 108.

And to each of these answers, the intervenors regularly filed their replication.

Record pp. 105, 107, 119.

The motion to strike out parts of the bill in intervention was allowed, and the parts so stricken out are indicated in the record.

Record pp. 121-126.

Thus it will be seen that the petition for leave to intervene was allowed, and an order regularly made admitting the intervenors as parties to the action; that they filed their bill in intervention setting up the grounds upon which they claimed the bill of complaint should be dismissed, and the receiver enjoined from further proceedings under the original order made by the Court; that to this bill in intervention answers were regularly filed, and replications filed to said answers, thereby putting the case at issue upon the merits of the allegations of the bill in intervention. This being so, the authorities cited by counsel on the other side are not in point. They relate entirely to orders of the Court refusing to permit parties to intervene, and upon the ground that ordinarily the question as to the right of a third party to intervene is one resting in the discretion of the Court below; but in this case the Court exercised its discretion in favor of the petitioning parties, and they were allowed to intervene and beome actors in the proceeding.

I Beach Modern Equity, Secs. 579-580.

The final order of the Court appealed from in this case is double in its nature. There was a motion made by the respondents to vacate the order granting leave to the appellants to intervene. We know of no rule of practice that authorizes any such proceeding. But they were not content with an order of that kind, but procured also an order dismissing the bill in intervention of the appellants, precisely as an order would have been made if it had been directed at an original bill. The order is as follows, the recitals of which show that the case was submitted not only upon the motion to vacate the previous order, but upon the bill in intervention and the answers thereto:

"This cause having heretofore been submitted to the Court for its consideration and decision upon . . . the bill in intervention and the answers thereto, and upon the mo-

tion of the complaint that the Court vacate the order heretofore made herein, granting leave to A. Y. Chick & Company to intervene and become parties herein *and to dismiss the petition and bill in intervention*, and the Court having duly considered the same and being fully advised in the premises, now, on this 3rd day of September, 1901, being a day in the July Term, A. D. 1901, of said Circuit Court of the United States, for the Southern District of California, the court files its written conclusions *upon the bill in intervention* and orders that the order allowing the bill in intervention to be filed be vacated, *and said bill dismissed.*"

Record p. 349.

It is directly held by the Supreme Court of the United States that an interventor has a right to appeal from a final decree, and on that appeal contest the validity of interlocutory orders made subsequent to his admission as a party and affecting his interests in the litigation.

Beach Mod. Eq., Sec. 579.

Ex Parte Jordan, 94 U. S. 248.

In Ex parte Jordan, the Court says:

"It is true that the petitoners were not parties to the suit until after the bill was taken as confessed, but it is clear that a decree *pro confesso* did not end the case, because before the final decree was rendered it was found necessary to have a reference to a master to compute, ascertain and report. Before the master could comply with this order, proof had to be taken, and the original time given him to report was extended for that purpose. When this reference was made, the petitioners were defendants and actors in respect to the litigation. They certainly had the right to contend before the master and except to his report. This they did; and their exceptions were overruled. Even the report of the master did not put the case in a condition for a final decree. The amount due upon the bonds and coupons had still to be ascertained. This was done by the court, and stated in the decree. Against these findings, certainly, the petitioners were in a condition to contend, and if to contend below, to appeal here. It will be time enough to consider what relief they can have under their appeal when the case comes up.

"While complaint is made of interlocutory orders entered in the progress of the cause, the appeal lies and was asked

only from the final decree. Whatever comes here comes through such an appeal."

In this case, the decree entered dismissing the bill in intervention of the intervenors was unquestionably a final decree. It put them entirely out of the case, with no right to be further heard. It was disclosed by the bill in intervention, as appears from the record, that theirs was the only defense made to the original bill, and that the original defendant, the San Joaquin Electric Company, had by its answer confessed all of the allegations of the original bill.

Record p. 91.

The bill in intervention of the intervenors and the prayer thereof shows distinctly that they were not only appearing as defendants in the action, but were asking affirmative relief directed against new parties brought in by their bill in intervention, as well as the original parties to the suit, by way of injunction restraining such parties from proceeding further in the disposition and use of the property in controversy.

Record p. 73.

And we are not without authority in support of our right to appeal under the conditions presented by the record. In the case of Easton, et al., vs. Houston & T. C. Ry. Co., 44 Fed. Rep., 7, the question of the right of appeal upon the dismissal of a bill in intervention was directly presented, and the Court in that case said:

"The question presented is practically this: Was the decree of November 16, 1887, dismissing the intervention of the Waters-Pierce Oil Company, without prejudice, a final decree? It disposes of the intervention on its merits, leaving the intervenor with no cause before the Court. It turned the intervenor out of Court, and condemned him to pay costs. That the decree was to be without prejudice means no more than that the intervenor might institute another suit to enforce his alleged rights, and, at best, might, perhaps, intervene again on the same cause of action in this same cause. A decree is final when it determines the litigation on the merits, and leaves nothing to be done but to enforce by execution what has been

determined.. See St. Louis etc. Ry Co. vs. Southern Exp. Co., 108 U. S. 24; Railway Co. v. Dinsmore, 108 U. S. 30; Ex parte Norton, 108 U. S. 237. When an intervention under a claim of a prior lien is dismissed, the order as to the intervenor is final. Gumbel v. Pitkin, 113 U. S. 545."

And Gumbel v. Pitkin, 113 U. S., 545, is conclusive of the question. It is said in the opinion:

"The order dismissing Gumbel's intervention disposes of his rights and is a final judgment as to that issue, as to which he has a writ of error. The order distributing the proceeds of the sale is also final, as it disposes of the fund."

To the same effect is Savannah v. Jessup, 106 U. S.. 563. And in Central Railroad and Banking Co. v. Farmers' Loan & Trust Co., 79 Fed. Rep., 158-169, the distinction is clearly made that we are insisting upon here between an order dismissing a bill in intervention and an order denying the right to intervene. In the case last cited, it was held that the appeal did not lie, and the statement in the opinion is that neither Gumbel v. Pitkin nor Savannah v. Jessup supported the contention, for the reason that *in each of said cases an intervention was filed by leave of the Court, and afterwards heard on its merits.*

In Buller v. Fayerweather, the general rule as to what constitutes a final or appealable order or decree is thus stated:

"Whenever in a case there is a determination of some question or right, the decision is final in the sense in which an appeal from it is permitted, if it decides and disposes of the while merits of the cause as between the parties to the appeal, reserving no further questions or directions for the further judgment of the Court, so that to bring the case again before the Court for decision will not be necessary."

And the cases just above cited, and others, are referred to as sustaining this ruling.

The power of the Court below to admit the appellants as parties that they might protect their ownership and interest in the bonds of the defendant company against the fraudulent attempt on the part of the other bondholders to use the trustee

complainant to bring about an unnecessary foreclosure and reorganization of the company, was ocmplete and ample.

Knippendorf v. Hyde, 110 U. S. 276.

Having exercised its jurisdiction in this respect, and allowed the intervention, its subsequent order dismissing the bill in intervention was final, and subject to review on appeal.

We respectfully submit that the order and decree appealed from in this case was final, disposing of the case fully and entirely so far as the intervenors were concerned, and putting them out of the case, and that therefore they were entitled to an appeal, and the appeal in this case is properly taken.

GEORGE E. CHURCH,
L. A. GROFF
JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
Counsel for Appellants.

NO. 782

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

Alfred Young Chick and William Flanders Lewin, co-partners under the firm name and style of A. Y. Chick & Company,

Appellants,

vs.

The Mercantile Trust Company and the San Joaquin Electric Company,

Appellees.

Supplemental Motion to Dismiss Appeal and Accompanying Brief.

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for The Mercantile Trust Company, Appellee.

Filed this *day of April, 1902.*

..... *Clerk.*

Tel. James 4141 T. J. Spencer, Law Printer, 238-242 New High St.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

Alfred Young Chick and William Flanders Lewin, co-partners under the firm name and style of A. Y. Chick & Company,

Appellants,

vs.

The Mercantile Trust Company and the San Joaquin Electric Company,

Appellees.

SUPPLEMENTAL MOTION TO DISMISS APPEAL.

Now comes The Mercantile Trust Company, a corporation, and moves the court to dismiss the appeal of Alfred Young Chick and William Flanders Lewin, doing business under the firm name and style of A. Y. Chick & Company, because, since the submission of this case in this court, and since the former motion to dismiss the appeal, said appellants have disposed of all the bonds formerly owned by them, and the purchaser thereof desires that said appeal be dismissed and the intervention in the cause be discontinued.

This motion will be made upon the transcript filed in this court, and upon the affidavit of C. F. Street, the sworn statement of C. F. Street, and the certificate of Victor Cumberson, and the sworn statement of L. Carroll Root, secretary of the New York Security & Trust Company, to be filed herein with this motion, copies of which are as follows:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Alfred Young Chick and William Flanders Lewin, co-partners under the firm name and style of A. Y. Chick & Company, Appellants, vs. The Mercantile Trust Company and the San Joaquin Electric Company, Appellees.	No. 782

STATE OF CALIFORNIA, }
COUNTY OF FRESNO. } ss.

C. F. Street, being first duly sworn, deposes and says:

That he is attorney in fact of the American Securities Agency, Limited, a corporation organized and existing under the laws of Great Britain, and has charge of the business of said corporation in the United States. That the American Securities Agency, Limited, has, ever since, and for some time before, the bringing of the suit of the Mercantile Trust Company against the San Joaquin Electric Company in the Circuit Court of the United States of the District of California, for the foreclosure of the first mortgage of said San Joaquin Electric Company, been the owner and holder of more than a majority of the first mortgage bonds of said San Joaquin Electric Company. That this affiant is familiar with all said litigation and knows of the proceed-

ings in intervention in said suit instituted by the firm of A. Y. Chick & Company, and is familiar with the bonds formerly owned by said A Y. Chick & Company, and upon which their application to intervene was based.

This affiant further says, sometime during the month of February, 1902, the American Securities Agency, Limited, purchased, and ever since that time has been the owner and holder of all the bonds formerly owned by A. Y. Chick & Company upon which their application for intervention was based, and that said bonds are numbered as follows, to wit: Nos. 49, 50, 77 to 86, 93, 94, 101 to 107, 233, 241 to 243, 451, 452, 557, 558, 561 to 572, 935 to 950 and 990 to 1010.

That all these bonds were by said American Securities Agency, Limited, on or about the first of February, 1902, sent to this affiant, and that the bonds are now in possession of the New York Security & Trust Company of New York. That on the 8th of April, 1902, this affiant addressed a letter to Messrs. Alexander & Green, solicitors for the Mercantile Trust Company, stating that the American Securities Agency, Limited, had purchased said bonds, which said letter is hereto attached, marked exhibit "A," and made a part of this affidavit.

That on the 13th day of March, 1902, one Victor Cumberson, a notary public in and for the County of New York, State of New York, called at the office of the New York Security & Trust Company and examined said bonds and made a written certificate that said bonds were there in the possession of said New York Security & Trust Company, which said certificate is hereto attached, marked exhibit "B" and made a part of this affidavit.

This affiant further says that the Secretary of the New York Security & Trust Company on the 8th day of April, 1902, made a sworn statement to this affiant

that that company held the said $39,000. of the San Joaquin Electric Company First Mortgage 6% bonds, numbering the bonds as above numbered, and that those bonds were subject to the order of this affiant and would be delivered to him upon payment of the money he had borrowed upon them, said statement of said secretary is hereto attached, marked exhibit "C," and made a part of this affidavit.

This affiant further says that A. Y. Chick & Company are no longer owners of any bonds of said San Joaquin Electric Company and that the American Securities Company, Limited, as the owner of the bonds formerly held by them, desires the appeal herein to be dismissed and the intervention discontinued.

C. F. STREET.

Subscribed and sworn to before me this 18th day of April, 1902.

[SEAL] A. HARVEY,

Notary Public in and for the County of Fresno, State of California.

EXHIBIT "A."

STREET, WYKES & CO.,
44 Wall Street, New York.
Cable address: "Warco," New York.

April, 8th, 1902.

Messrs. Alexander & Green, 120 Broadway, City.

Gentlemen: I beg to advise you that we have purchased $39,000 par value of the first mortgage 6% bonds of the San Joaquin Electric Company, with July, 1899, and all subsequent coupons attached. These bonds are numbered as follows:

Nos. 49, 50, 77 to 86, 93, 94, 101 to 107, 233, 241 to

243, 451, 452, 557, 558, 561 to 572, 935 to 950 and 990 to 1010.

Yours truly,
AMERICAN SECURITIES AGENCY, LYD.,
By C. F. STREET, *Attorney*.

Subscribed and sworn to before me this 8th day of April, 1902.

[SEAL] VICTOR CUMBERSON,
Notary Public, N. Y. County.

EXHIBIT "B."

STATE OF NEW YORK, }
CITY & COUNTY OF NEW YORK. } ss.

I hereby certify that on the 13th of March, 1902, I called at the office of the New York Security & Trust Company, and there examined 78 first mortgage 6% bonds of the San Joaquin Electric Company. All of said bonds have the July, 1899, and all subsequent coupons attached, are of the denomination of $500 each, amounting in the aggregate to the par value of $39,000.

Said bonds are numbered as follows :

Nos. 49, 50, 77 to 86, 93, 94, 101 to 107, 233, 241 to 243, 451, 452, 557, 558, 561 to 572, 935 to 950 and 990 to 1010.

In witness whereof I have hereunto set my hands and affixed my notarial seal this 8th day of April, 1902.

[SEAL] VICTOR CUMBERSON,
Notary Public, N. Y. County.
[No. 149.]

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.

I, Thomas L. Hamilton, clerk of the county of New York, and also clerk of the Supreme Court for the said

county, the same being a court of record, do hereby certify that Victor Cumberson, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said county, duly appointed and sworn and authorized to administer oaths to be used in any court in said state, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county the 8 day of April, 1902.

[SEAL] THOS. L. HAMILTON, *Clerk.*

EXHIBIT "C."

NEW YORK SECURITY & TRUST COMPANY,
44 & 46 Wall Street.

NEW YORK, Apr. 8, 1902.

Charles S. Fairchild, President.
Abram M. Hyatt, Vice President.
Osborn W. Bright, 2nd Vice President.
L. Carroll Root, Secretary.
Zelah Van Loan, Assistant Secretary.
Charles R. Braine, Jr., 2nd Asst. Secy.
James E. Keeler, Trust Officer.
Bond Department, H. W. Whipple, Manager.

C. F. Street, Esq., attorney, American Securities Agency, Ltd., 44 Wall St., New York City.

Dear Sir: We beg to advise you that we hold $39,000. of the San Joaquin Electric Company first mortgage 6% bonds, with July, 1899, and all subsequent coupons attached, which bonds are numbered as follows:

Nos. 49, 50, 77-86 inc., 93, 94, 101-107 inc., 233, 241-243 inc., 451, 452, 557, 558, 561-572 inc., 935-950 inc., and 990-1010 inc.

These bonds are subject to your order and will be delivered to you upon payment to us of the moneys you have borrowed upon them.

Yours truly,

L. CARROLL ROOT,

Secretary.

Subscribed and sworn to before me this 8th day of April, 1902.

[SEAL] VICTOR CUMBERSON,

Notary Public, N. Y. County.

[No. 149.]

ALEXANDER & GREEN,

CHAS. MONROE,

Solicitors for The Mercantile Trust Company, Appellee.

To George E. Church, L. A. Groff, John D. Works, Bradner W. Lee and Lewis R. Works, Solicitors for Appellants:

You and each of you are hereby notified that the foregoing supplemental motion to dismiss appeal will be called up for hearing before the United States Circuit Court of Appeals for the Ninth Circuit, on Tuesday, the 6th day of May, 1902, at the opening of court on that day, or as soon thereafter as counsel can be heard, in the court room of said court, in the city of San Fraucisco, state of California.

ALEXANDER & GREEN,

CHAS. MONROE,

Solicitors for The Mercantile Trust Company, Appellee.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

A. Y. Chick et al., Appellants,
vs.
The Mercantile Trust Company (a corporation) et al., Appellees.

BRIEF ACCOMPANYING SUPPLEMENTAL MOTION TO DISMISS APPEAL.

It appears from the affidavits filed herein that since the submission of the case and the original motion to dismiss the appeal herein, the American Securities Agency, Limited, has acquired and now owns the bonds formerly owned by the alleged intervenors, and that that company desires the appeal to be dismissed and the intervention discontinued.

That it may be seen that the bonds acquired by the American Securities Company, Limited, are the same as the ones formerly held by A. Y. Chick & Company the court is referred to the deposition of Alfred Young Chick, on page 189 of the transcript, where he gives the numbers of the bonds held by A. Y. Chick & Company, and they are identical with the numbers of the bonds given in the affidavits submitted with this motion.

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for Appellee, The Mercantile Trust Company.

No. 791

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

AMERICAN SALES BOOK COMPANY (A CORPORATION) AND WARREN F. BECK,

Plaintiffs in Error,

vs.

JOSEPHUS BULLIVANT, JR.,

Defendant in Error.

TRANSCRIPT OF RECORD.

In Error to the Circuit Court of the United States for the District of Oregon.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME ST., S. F.

INDEX.

In the Circuit Court of the United States for the District of Oregon.

AMERICAN SALES BOOK COMPANY (a Corporation), and WARREN F. BECK,

Plaintiffs,

vs.

JOSEPHUS BULLIVANT, Jr.,

Defendant.

Stipulation as to Printing Record and Assignment of Cause.

It is hereby stipulated between the parties that, when printing the record in the above-entitled case for the hearing of the writ of error, it shall not be necessary for the original plaintiffs' Exhibits "B" and "C" and defendant's original Exhibits "A," "B," and "C," to be reproduced, but that such original exhibits, having, by the stipulation of the parties heretofore entered into, and in accordance with the order of the United States Circuit Court, for the District of Oregon, been forwarded to the United States Circuit Court of Appeals for the Ninth Circuit, may be used in the argument in the latter court.

It is further stipulated that this cause may be assigned to the term of the said Circuit Court of Appeals held at San Francisco in February, 1902.

Dated, January 11, 1902.

T. J. GEISLER,
Attorney for Plaintiffs.
OTTO J. KRAEMER,
Attorney for Defendant.

[Endorsed]: No. 791. In the Circuit Court of the United States, for the District of Oregon. American Sales Book Co. (a Corporation), and Warren F. Beck, Plaintiffs, vs. Josephus Bullivant, Jr., Defendant. Stipulation as to Printing Record and Assignment of Cause. Filed January 15, 1902. F. D. Monckton, Clerk.

Citation on Writ of Error.

United States of America, } ss.
District of Oregon. }

To Josephus Bullivant, Jr., Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, purusant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Oregon, wherein American Sales Book Company, a corporation, and Warren F. Beck are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this December 17th, 1901.

WM. B. GILBERT,
Judge.

Due service of within citation is hereby admitted December 17, 1901,

OTTO J. KRAEMER,
Attorney for Defendant.

[Endorsed]: No. 2,665. United States Circuit Court, District of Oregon. American Sales Book Company and Warren F. Beck vs. Josephus Bullivant, Jr. Citation on Writ of Error. Filed December 17, 1901. J. A. Sladen, Clerk, By G. H. Marsh, Deputy Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit,

AMERICAN SALES BOOK COMPANY (a Corporation), and WARREN F. BECK,
Plaintiffs in Error,
vs.
JOSEPHUS BULLIVANT, Jr.,
Defendant in Error.

Writ of Error.

The United States of America—ss.

The President of the United States of America, to the Judges of the Circuit Court of the United States for the District of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court before the Honorable Charles B. Bellinger,

one of you, between American Sales Book Company, a Corporation, and Warren F. Beck, plaintiffs and plaintiffs in error, and Josephus Bullivant, Jr., defendant and defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this December 17, 1901.

[Seal] J. A. SLADEN,

Clerk of the Circuit Court of the United States for the District of Oregon.

By G. H. Marsh,

Deputy Clerk.

[Endorsed]: In the United States Circuit Court of Appeals, for the Ninth Circuit. American Sales Book Company et al., Plaintiffs in Error, vs. Josephus Bullivant, Jr., Defendant in Error. Writ of Error. Filed December 17, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon. By G. H. Marsh, Deputy Clerk.

Copy of this writ filed by me December 17, 1901.

J. A. SLADEN,

Clerk United States Circuit Court, District of Oregon.

In the Circuit Court of the United States for the District of Oregon.

October Term, 1900.

Be it remembered, that on the 9th day of March, 1901, there was duly filed in the Circuit Court of the United States for the District of Oregon, a declaration, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of of Oregon.

AMERICAN SALES BOOK COMPANY (a Corporation),

Plaintiff,

vs.

JOSEPHUS BULLIVANT, Jr.,

Defendant.

Declaration—Trespass on the Case.

District of Oregon—ss.

American Sales Book Company, a corporation duly organized, existing and domiciled at Elmira, in the State

of New York, plaintiff in this action, by T. J. Geisler, its attorney, complains of Josephus Bullivant, Jr., a citizen of the State of Oregon, defendant, of the plea of trespass on the case.

For that Warren F. Beck of Elmira, New York, before and at the time of his application for the hereinafter mentioned letters patent, was a citizen of the United States, and was the true, original, first and sole inventor of the certain new and useful improvements in pads designed for use by merchants and others in taking manifold copies of orders, etc., duly described in the specification forming part of the letters patent hereinafter mentioned, and named therein as "Improvements in Manifold Sales Book and Holders," and which was not known or used before his invention or discovery thereof, or patented, or described in any printed publication in any country before his invention or discovery thereof, more than two years prior to this application, or in public use, or on sale in the United States for more than two years prior to this application, and no application for a patent on said improvements having been filed by him, or his legal representatives, or assigns in any country foreign to the United States prior to his application for letters patent of the United States therefor.

And for that, on the 24th day of April, 1900, letters patent for said invention in due form of law were, on the application of the said Warren F. Beck, duly issued and delivered to him in the name of the United States of America, and under the seal of the Patent Office of the United States, and were signed by the Secretary

of the Interior of the United States and countersigned by the Commissoner of Patents, said letters patent being dated on said last mentioned day, and numbered No. 647,934.

And for that, said letters patent did grant to said Warren F. Beck, his heirs and assigns, for the term of seventeen years, beginning with the said last mentioned day, the exclusive right to make, use and vend the said patented invention, and permit others so to do, throughout the United States and the territories thereof.

And for that, heretofore after the issue of the said letters patent hereinbefore mentioned, and prior to each and all of the acts of infringement hereinafter complained of against the defendant, the said Warren F. Beck, by an instrument in writing duly executed and delivered by him to the plaintiff, did assign, transfer and set over to the plaintiff all his right, title and interest whatever in said invention; and the plaintiff at the times of the said acts of infringements was, and still is exclusive owner of all right, title and interest in, to or under the said letters patent.

And the plaintiff says that since the plaintiff has become the owner of all the right, title and interest in and to said letters patents, it extensively practiced the said patented invention; and did make and vend to merchants and others such manifolding salesbooks and holders in large quantities to its great advantage and profit. And that the plaintiff at all times was, and still is prepared to supply said patented manifolding sales books to all

who desire to purchase the same. That the said patented invention through said efforts of this plaintiff has become extensively advertised, and is widely known. That on the said manifolding sales books so manufactured and sold by the plaintiff due and sufficient notice was given to the public that the invention therein comprised had been duly patented; and that the public generally have acknowledged the merits and utility of said invention, and the rights of the plaintiff under said letters patent issued therefor. That about the 1st day of February, 1901, the defendant was further personally apprised of the said letters patent, and manifolding sales books, manufactured by plaintiff and embodying said patented improvements, were offered for sale to him.

Yet the defendant knowing the premises and though having need of such manifolding sales books, refused to purchase the same from plaintiff and its agents; and instead, for the purpose of contriving to injure the plaintiff, from about the first day of February, 1901, continuously to the 8th day of March, 1901, during the term of said letters patent, unlawfully and wrongfully, without the consent, and against the will of the plaintiff, did use in his business at Portland in the State of Oregon, manifolding sales books embodying said patented improvements, which books, the defendant had unlawfully procured from one W. H. Jarrett, residing out of this District of Oregon, to wit, at Seattle, Washington, in violation and infringement of the said exclusive right secured by said letters patent and assignment thereof to this plaintiff, and contrary to the statutes of

the United States in such cases made and provided; whereby the plaintiff has been greatly injured and deprived of profits, royalties and benefits which it otherwise would have derived, and has sustained actual damages in the amount of $100.

Wherefore, by force of the statutes of the United States a right of action has accrued to the plaintiff to recover the said actual damages, and such additional amount not exceeding in the whole three times the amount of said actual damages, as the Court may see fit to adjudge and order, besides costs; which damages, however, the defendant has refused, and still refuses to pay, and, therefore, the plaintiff brings this action.

T. J. GEISLER,
Attorney for Plaintiff.

United States of America,
District of Oregon. } ss.

I, Charles H. Wilcox, of Portland, Oregon, being first duly sworn, depose and say that I am the agent and representative of the plaintiff in the above-entitled case within and for the State of Oregon; that I have read the foregoing declaration, and that the same is true as I verily believe; that the reason that this verification is made by me is that the plaintiff is a corporation domiciled at Elmira in the State of New York, and that none of the officers thereof are within the State of Oregon; and that I have personal knowledge of all the material allegations alleged in said declaration.

C. H. WILCOX.

Subscribed and sworn to before me this 8th day of March, 1901.

[Seal] T. J. GEISLER,
Notary Public for Oregon.

Filed March 9, 1901. J. A. Sladen, Clerk, United State Circuit Court, District of Oregon.

RETURN OF CIVIL PROCESS.

United States of America,
District of Oregon. } ss.

I hereby certify that on the 9th day of March, 1901, at Portland, Multnomah, in said district, I duly served the within summons upon the therein named Josephus Bullivant, Jr., by delivering to him personally a true copy of said summons, duly certified to by J. A. Sladen, together with a copy of the complaint in the within entitled cause, duly certified to by T. J. Geisler, attorney for the plaintiff.

ZOETH HOUSER,
United States Marshal.
By S. L. Morse,
Deputy.

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

AMERICAN SALES BOOK COMPANY (a Corporation),
Plaintiff,
vs.
JOSEPHUS BULLIVANT, Jr.,
Defendant.
No. 2665.

Summons.

The President of the United States to Josephus Bullivant, Jr., the above-named Defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Portland, in said District, and answer the complaint filed against you in the above-entitled action within ten days from the date of the service of this summons upon you, if served within the county of Multnomah, in said District, or if served within any other county of said District then within thirty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will take judgment against you for the snm of $100.00, actual damages, and such additional amount, not exceeding in the whole, three times the amount of said actual damages, as the Court may see fit to adjudge or order, besides costs.

And this is to command you, the marshal of said District, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, affixed at Portland, in said District this 9th day March, 1901.

[Seal] J. A. SLADEN,
Clerk.
By G. H. Marsh,
Deputy Clerk.

Returned and filed March 11, 1901. J. A. Sladen, Clerk. United States Circuit Court, District of Oregon.

And afterwards, to wit, on Monday, the 6th day of May, 1901, the same being the 25th judicial day of the regular April term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

AMERICAN SALES BOOK COMPANY (a Corporation),
vs.
JOSEPHUS BULLIVANT, Jr.

No. 2665.
May 6, 1901.

Order Amending Declaration.

Now, at this day, on motion of Mr. T. J. Geisler, of counsel for the plaintiff herein, it is ordered that said plaintiff be, and it is hereby, allowed to make Warren F. Beck, of Illinois, a party plaintiff in this cause.

And afterwards, to wit, on the 7th day of May, 1901, there was duly filed in said court an amended declaration, in words and figurs as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

AMERICAN SALES BOOK COMPANY (a Corporation), and WARREN F. BECK,
Plaintiffs,
vs.
JOSEPHUS BULLIVANT, Jr.,
Defendant.

Amended Declaration—Trespass on the Case.

District of Oregon—ss.

By leave of the Court obtained, American Sales Book Company, a corporation duly organized, existing and domiciled at Elmira, in the State of New York, and Warren F. Beck, a citizen of the State of New York, also residing at Elmira aforesaid, plaintiffs in this action, by T. J. Geisler, their attorney, complains of Josephus Bullivant, Jr., a citizen of the State of Oregon, defendant, of the plea of trespass on the case.

For that Warren F. Beck of Elmira, New York, before and at the time of his application for the hereinafter-mentioned letters patent was a citizen of the United States, and was the true, original, first and sole inventor of the

certain new and useful improvements in pads designed for use by merchants and others in taking manifold copies of orders, etc., duly described in the specification forming part of the letters patent hereinafter mentioned, and named therein as "Improvements in Manifolding Sales-Books and Holders," and which was not known or used before his invention or discovery thereof, or patented, or described in any printed publication in any country before his invention or discovery thereof, or more than two years prior to his application, or in public use, or on sale in the United States for more than two years prior to his application, and no application for a patent on said improvements having been filed by him, or his legal representative, or assigns in any country foreign to the United States prior to his application for letters patent of the United States therefor.

And for that, on the 24th day of April, 1900, letters patent for said invention in due form of law were, on the application of the said Warren F. Beck, duly issued and delivered to him in the name of United States of America, and under the seal of the Patent Office of the United States, and were signed by the Secretary of the Interior of the United States and countersigned by the Commissioner of Patents, said letters patent being dated on said last mentioned day, and numbered No. 647,934, which letters patent, or a certified copy thereof, the plaintiffs will produce on the trial of this cause, as the Court may direct.

And for that, in and by said letters patent there was granted unto the said Warren F. Beck, as said inventor, and his legal representatives, the exclusive right for the

term of seventeen (17) years beginning with the said date of said letters patent to make, use, and sell, and permit others so to do throughout the United States and territories thereof, manifold sales books or pads, embodying the following described improvement, or feature:

"The combination, with a manifold-pad, of a carbon or transfer-sheet normally resting upon the top of the pad and overlying the leaves thereof, said transfer-sheet having a portion cut away to expose a portion of said leaves at or near their free ends for the purpose set forth, the leaves at their free ends being otherwise concealed by the transfer-sheet."

And for that, heretofore after the issue of the said letters patent hereinbefore mentioned, and prior to each and all of the acts of infringement hereinafter complained of against the defendant, the said Warren F. Beck, by an instrument in writing duly executed, entered into an agreement (which to plaintiffs will produce at the trial of this cause if required) between himself and the above-named plaintiff American Sales Book Company, a corporation giving and granting unto the latter the exclusive right to make, use and sell and permit others so to do throughout the United States, and its territories, manifold sales books or pads, embodying the above-described patented invention and improvement; and, in and by the terms of said agreement the said American Sales Book Company undertook and promised to practice said invention for the benefit of themselves and said Warren F. Beck, patentee; and further to do all in its power to introduce said patented invention, to secure for the said

Warren F. Beck his benefits and profits which would be derived by the practice of said invention, and to prosecute at its own expense, and protect said Warren F. Beck against all unlawful infringers of the said exclusive rights granted by said letters patent.

And the plaintiffs further allege that since the execution of said agreement in relation to said patented invention the said American Sales Book Company has extensively practiced the said patented invention, and has extensively introduced the same, and made and vended to merchants and others in large quantities manifolding sales books, or pads, embodying said invention to its great advantage and profit. And that the said American Sales Book Company at all times was, and still is prepared to supply said patented manifolding sales books to all who desire to purchase the same. That the said patented invention through said efforts of said plaintiff has become extensively advertised, and is widely known. That on the said manifolding sales book so manufactured and sold by the plaintiff due and sufficient notice was given to the public that the invention therein comprised had been duly patented; and that the public generally have acknowledged the merits and utility of said invention, and the rights of the plaintiff under said letters patent issued therefor. That about the first day of February, 1901, the defendant was further personally apprised of the said letters patent, and manifolding sales book, manufactured by said plaintiff, and embodying said patented improvements, were offered for sale to him.

Yet the defendant knowing the premises and though

having need of such manifolding sales books, refused to purchase the same from plaintiff and its agent; and instead, for the purpose of contriving to injure the plaintiff, from about the first day of February, 1901, continuously to the 8th day of March, 1901, during the term of said letters patent, unlawfully and wrongfully, without the consent, and against the will of the plaintiff, did use in his business at Portland in the State of Oregon, manifolding sales books embodying said patented improvement, which books, the defendant had unlawfully procured from one W. H. Jarrett (residing out of this District of Oregon, to wit, at Seattle Washington), in violation and infringement of the said exclusive right secured by said letters patent to these plaintiffs, and contrary to the statutes of the United States in such cases made and provided; whereby the plaintiffs have been greatly injured and deprived of profits, royalties and benefits which they otherwise would have derived, and have sustained actual damages in the amount of one hundred dollars.

Wherefore, by force of the statutes of the United States a right of action has accrued to the plaintiff to recover the said actual damages, and such additional amount not exceeding in the whole three times the amount of said actual damages, as the Court may see fit to adjudge and order, besides costs; which damages, however, the defendant has refused, and still refuses to pay, and therefore, the plaintiff brings this action.

T. J. GEISLER,
Attorney for Plaintiff.

United States of America,
District of Oregon. }

I, Charles H. Wilcox, of Portland, Oregon, being first duly sworn, depose and say that I am the agent and representative of the plaintiff in the above-entitled case within and for the State of Oregon; that I have read the foregoing declaration, and that the same is true as I verily believe; that the reason that this verification is made by me is that the plaintiff is a corporation domiciled at Elmira in the State of New York, and that none of the officers thereof are within the District of Oregon.

C. H. WILCOX.

Subscribed and sworn to before me this 6th day of May, 1901.

[Seal] T. J. GEISLER,
Notary Public for Oregon.

Service of copy of within amended declaration is hereby admitted.

May 6, 1901.

OTTO J. KRAEMER,
Attorney for Defendant.

Filed May 7, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 28th day of June, 1901, there was duly filed in said court a plea of defendant, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

AMERICAN SALES BOOK COMPANY (a Corporation), and WARREN F. BECK,
Plaintiffs,
vs.
JOSEPHUS BULLIVANT, Jr.,
Defendant.

Plea to Amended Declaration.

Comes now the defendant herein by his attorney, Otto J. Kraemer, and defends the wrong and injury when and in the manner as alleged in the plaintiffs' declaration of trespass in the case or otherwise, and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or any part thereof in manner and form as the said plaintiffs have above complained against him, and of this the defendant puts himself upon the country, and the defendant gives the following notices in writing of special matters to the plaintiffs thirty days prior to the trial:

The plaintiffs will take notice that the above-named defendant will prove upon the trial of this cause in bar of the said plaintiff action as follows:

That the said invention and device claimed by the plaintiffs was not new when produced, and that substantially the same invention and device as claimed by the plaintffs was in use and manufacture for many years prior to and at the time when the said Warren F. Beck of Elmira, New York, applied for and obtained letters patent, to wit: On April 24th, 1900, and number 647,934, and which said old invention, device or manufacture above referred to is illustrated to a great extent by duplicate and triplicate order, shipping and receipt books manufactured and sold by Charles E. Crosby & Company of St. Paul, Minnesota, doing business in the Union Block, corner Fourth and Cedar streets.

And, further, that the invention and device claimed by the plaintiffs as in their declaration herein set forth is substantially the same invention and device as is and has been for more than two years last past and prior to the issuance of the letters patent in the declaration herein set forth, in use and for sale in this country, as is shown by thumbhold indexes and the index systems used in ledgers and other books generally, and also in the manner in which carbon transfer sheets now are and for the same length of time have been used, fastened at one end upon check or sale pads and so sold in this country.

That the combination of the plaintiffs' patent is simply a mechanical union of many old inventions and devices and in no manner required inventive art or genius, or produced any new effect entitling plaintiffs to the patent claimed.

OTTO J. KRAEMER,
Attorney for Defendant.

United States of America,
District of Oregon. } ss.

On this 10th day of June, 1901, personally appeared before me Josephus Bullivant, who makes solemn oath that the facts set forth in the above plea are true to the best of his knowledge and belief.

J. BULLIVANT, Jr.

Subscribed and sworn to before me this 10th day of June, 1901.

[Seal] OTTO J. KRAEMER,
Notary Public for Oregon.

Due services of a copy hereof properly certified is hereby accepted this 10th day of June, 1901.

T. J. GEISLER,
Attorney for Plaintiff.

Filed June 28, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And, to wit, on the 24th day of June, 1901, there was duly filed in said court a replication in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

AMERICAN SALES BOOK COMPANY (a Corporation), and WARREN F. BECK,
Plaintiffs,
vs.
JOSEPHUS BULLIVANT, Jr.,
Defendant.

Replication.

And the said plaintiffs as to the said pleas of the said defendant by him being pleaded, and of which he has put himself upon the country doth the like.

And the plaintiffs as to the said plea of the defendant by him secondly above pleaded, say that the said Charles E. Crosby & Company of St. Paul, Minnesota, did not manufacture or sell any duplicate or triplicate order, shipping or receipt book in anywise anticipating or disclosing the said patented invention of plaintiffs prior to the invention thereof by the plaintiff, Warren F. Beck, nor was the said patented invention known or in use prior to said invention, and of this the plaintiffs put themselves upon the country.

And the plaintiffs as to the said plea of the defendant thirdly above pleaded, say that the said invention is not in anywise the same invention and device which is or has been for more than two years prior to the application for said letters patent on said invention in use or on sale in this country as shown by thumbhold indexes or the index system used in ledgers or any other form of books, or in the manner in which carbon transfer-sheets have ever been used, and of this the plaintiffs put themselves upon the country.

T. J. GEISLER,
Attorney for Plaintiffs.

United States of America, }
District of Oregon. } ss.

On this 15th day of June, 1901, before me personally appeared Charles H. Wilcox, who being by me duly sworn, did depose and say: I am the agent and representative of the plaintiffs in the above-entitled cause within the State of Oregon; that I have read the foregoing replication and that the same is true as I verily believe; that the reason that this verification is made by me is that the plaintiff is a corporation domiciled at Elmira in the State of New York, and that none of the offices thereof are in the District of Oregon.

C. H. WILCOX.

Subscribed and sworn to before me this 15th day of June, 1901.

[Seal] T. J. GEISLER,
Notary Public for Oregon.

A certified copy of the above as within was duly served. Dated June 17, 1901.

OTTO J. KRAEMER,
Attorney for Defendant.

Filed June 24, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 24th day of June, 1901, there was duly filed in said court a stipulation to set cause for trial, in words and figures, as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

AMERICAN SALES BOOK COMPANY (a Corporation), and WARREN F. BECK,
Plaintiffs,
vs.
JOSEPHUS BULLIVANT, Jr.,
Defendant.

Stipulation to Set Cause for Trial.

It is hereby stipulated that the above-entitled cause may now be set for trial, and that all informalities in the pleadings may be waived, and the case when tried be submitted on the merits according to the law and facts involved.

T. J. GEISLER,
Attorney for Plaintiffs.
OTTO J. KRAEMER,
Attorney for Defendant.

Filed June 24, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on Monday, the 14th day of October, 1901, the same being the 7th judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

AMERICAN SALES BOOK COMPANY,

vs.

JOSEPHUS BULLIVANT, Jr.,

No. 2,665. October 14, 1901.

Order Setting Cause for Trial.

Now, at this day, on motion of Mr. T. J. Geisler, of counsel for the above-named plaintiff, it is ordered that the trial of this cause be, and the same is hereby, set for Monday, October 28, 1901.

And afterwards, to wit, on the 28th day of October, 1901, there was duly filed in said court a stipulation waiving jury, and of facts, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

AMERICAN SALES BOOK COMPANY (a Corporation), and WARREN F. BECK,
Plaintiff,
vs.
JOSEPHUS BULLIVANT, Jr.,
Defendant.

Stipulation Waiving Jury and of Facts.

It is hereby stipulated that this cause be tried by the Court without a jury; and that upon such trial the following facts shall be assumed as duly proved:

1. That on the 24th day of April, 1900, letters patent of the United States were issued by the United States Patent Office under No. 647,934, to Warren F. Beck of Elmira, New York, and that Plaintiffs' Exhibit "A" is a true copy of such patent.

2. That the said Warren F. Beck is still the owner of such letters patent; and that by an agreement duly entered into between himself and the plaintiff, American Sales Book Company, a corporation, the latter has

the exclusive right to make, use and sell, and permit others so to do throughout the United States and its territories, manifold sales book or pads embodying the invention described in said letters patent.

3. That the defendant is, and for a long time past has been, carrying on a grocery business at Nos. 461-463 Jefferson St., in the city of Portland, within this District.

4. That the defendant bought from the Ideal Duplicate Order Book Company of Seattle, Washington, a number of sales books of the style as Plaintiffs' Exhibit "B," and used the same in the ordinary course of his business subsequent to said letters patent.

5. That for many years prior to the application for the issuance of the letters patent in question on the said invention, duplicate order books were in general use, the same having a carbon sheet, loose or secure in place, for transferring the memorandum of the order written on one sheet to a duplicate sheet or sheets arranged below. But in none of such books did the carbon sheet have a corner cut away, or a thumbhole, for the purpose stated by said Beck in his specification of said invention forming a part of said patent.

6. That prior to said invention and letters patent duplicate order books with carbon were also in common use, in which books certain sheets thereof on which the memorandum was to be written or copied had corners cut away, as shown in illustration on card of Chas. E. Crosby & Company, Defendant's Exhibit "A," and also as shown in sheets with carbon marked, Defendant's Exhibit "B."

7. That for many years prior to said invention, books, ledgers and the like have been in common use, which, for the purpose of facilitating the use of the index with which they were provided, had thumbholes enabling the opening of the book at a certain place.

8. That the defendant relies on the devices referred to above in paragraphs 5, 6 and 7, of this stipulation as proving that the said patented invention lacks novelty, and is merely a mechanical change of existing devices.

9. That the plaintiffs claim only by infringement of claims two and three of said letters patent.

10. That it is stipulated that if the plaintiffs recover, they shall not be entitled to more than nominal damages of defendant.

T. J. GEISLER,
Attorney for Plaintiffs.

OTTO J. KRAEMER,
Attorney for Defendant.

Filed October 28, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 27th day of November, 1901, there was duly filed in said court findings of fact and conclusion of law, in words and figures as follows, to wit:

In the United States Circuit Court, for the District of Oregon

AMERICAN SALES BOOK COMPANY (a Corporation), and WARREN F. BECK,
Plaintiffs,
vs.
JOSEPHUS BULLIVANT, Jr.,
Defendant.

Findings of Fact and Conclusions of Law.

This cause having come on to be heard and determined upon the merits thereof, the plaintiffs appeared by their attorney, Mr. T. J. Geisler, and the defendant by his attorney, Mr. Otto J. Kraemer; and the plaintiffs having called as witnesses on their behalf Charles H. Wilcox and ——— Strauhal; and a stipulation as to certain facts having been also introduced in evidence, and the case thereupon argued, the Court at this time makes the following:

FINDINGS OF FACT.

1. That the plaintiff, American Sales Book Company is a corporation duly organized, existing and domiciled at Elmira, in the State of New York; and that Warren

F. Beck is a citizen of the State of New York, also residing at Elmira aforesaid, and that the defendant is a citizen of the State of Oregon.

2. That on the 24th day of April, 1900, letters patent of the United States were upon the application of the plaintiff, Warren F. Beck as inventor, duly issued to said Beck by the United States Patent Office under number 647,934, for an improvement in manifolding sales book and holder; and in and by such letters patent there was granted unto the said Warren F. Beck and his legal representatives, the exclusive right for the term of seventeen years, beginning said 24th day of April, 1900, being the date of said letters patent, to make, use and sell, and permit others so to do, throughout the United States and territories thereof, manifold sales books embodying the features described in the specification forming a part of said letters patent, and therein claimed as follows:

"The combination, with a manifold-pad of a holder or cover therefor having a carbon or transfer-sheet secured thereto, said transfer-sheet being folded over upon the leaves of the pad, at their free ends and having a portion cut away to expose a portion of the leaves at or near their free ends for the purpose set forth.

"The combination, with a manifold-pad of a carbon or transfer-sheet normally resting upon the top of the pad, and overlying the leaves thereof, said transfer-sheet having a portion cut away to expose a portion of said leaves at or near their free ends for the purpose set forth, the leaves at their free ends being otherwise con-

cealed by the transfer-sheet." And that Plaintiffs' Exhibit "A" is a true copy of said letters patent and Plaintiffs' Exhibit "B" is a manifolding sales book embodying said patent improvement.

3. That the said Warren F. Beck is still the owner of said letters patent; and that by an agreement duly entered into between himself and the plaintiff, American Sales Book Company, the former gave the latter the exclusive right to make, use and sell throughout the United States and its territories manifold sales books, or pads, embodying the alleged invention described and claimed in said letters patent.

4. That the defendant is and for a long time has been carrying on a grocery business at No. 461-463 Jefferson St., in the City of Portland, and District of Oregon.

5. That subsequent to the granting of said letters patent, the defendant without authority from or consent of the plaintiffs, or either thereof, or their legal representatives, procured from one W. H. Jarrett, doing business under the name of the Ideal Duplicate Order Book Company at Seattle, Washington, a number of sales books of the style of Plaintiffs' Exhibit "C"; and that the defendant used said duplicate sales books in the ordinary course of his business, and continued to so use the same after he had been personally advised of the granting of said alleged letters patent to the said plaintiff, Warren F. Beck, and the alleged rights of the plaintiff, American Sales Book Company, under said alleged letters patent.

6. That the manifold sales book procured and used by the defendant as aforesaid embodied the said features and improvements patented to the said Warren F. Beck by said letters patent.

7. That prior to the discovery by said Warren F. Beck of said alleged patented improvement in manifolding sales book, no manifolding sales books were made, used or known embodying said particular and patented features or improvements, to wit, comprising a holder, or cover, and a pad on the top of which normally rested a carbon or transfer-sheet, said sheet overlying the free ends of the leaves of the pad, and covering the leaf under it; and said transfer sheet having a portion cut away to expose a portion of said leaf under it near its free end, and facilitating the withdrawal of the same from under said transfer-sheet, as in said patent described and claimed, and as shown in Plaintiffs' Exhibit "B." But for many years prior to the appiication for the issuance of the said letters patent on said alleged invention of Beck, duplicate order books were in general use in the United States, having a carbon sheet, loose or secured in place, for transferring the memorandum of the order written on one sheet, to a duplicate sheet, or sheets, arranged below, one illustration of which is Defendant's Exhibit "A." But in none of such manifolding books did the carbon sheet have a corner cut away, or a thumbhole for the purpose stated by said Beck in his specification of his said invention, forming a part of said letters patent.

8. That prior to the said invention and letters patent duplicate order books with carbon were also in common use in the United States, in which books certain sheets thereof which the memorandum was to be written or copied had corners cut away, as shown in illustration on card of Charles E. Crosby & Company, being Defendant's Exhibit "B," and also as illustrated by Defendant's Exhibit "C."

9. That for many years prior to said invention of Beck, books, ledgers and the like have been in common use in the United States, which, for the purpose of facilitating the use of the index with which they were provided, had thumbholes enabling the opening of the book at a certain place.

10. That in accordance with said agreement between the plaintiffs, American Sales Book Company and Warren F. Beck, said American Sales Book Company has extensively practiced the said alleged patented invention, and manufactured, advertised and introduced throughout the United States manifold sales books embodying said alleged patented improvement; and that in the northwestern States within the year ending about August, 1901, large quantities of manifold sales books embodying said alleged invention, to wit: About 500,000 have been sold to merchants and others in said Northwestern territory, and are now in use in said territory.

11. That the defendant relied on the stipulation as to facts herein, and also as illustrated by Defendant's Exhibits "A," "B," and "C"; and also upon the use of

thumbholes in indexes for books, as proving that the said invention lacks novelty, and is merely a mechanical change of said existing devices.

12. That the said alleged patented improvement offers no greater advantages or utility than the form of manifold sales books in use in the United States prior to said alleged patented invention, as shown by the evidence, defendant's exhibits, and stipulation herein.

And, as a conclusion of law, the Court finds:

That the patent relied upon by the plaintiffs, being numbered 647,934, and issued to Warren F. Beck by the United States of America under seal of the Patent Office and on the 24th day of April, 1900, is void for lack of novelty; that being void, the defendant, Josephus Bullivant, Jr., by the acts committed has in no way damaged the plaintiffs herein, and that a judgment be entered in favor of the defendant for his costs and disbursements taxed at thirty dollars; and that plaintiffs take nothing by reason of this action.

(Signed) CHARLES B. BELLINGER,
Judge.

Filed November 27, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 27th day of December, 1901, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

AMERICAN SALES BOOK COMPANY (a Corporation), and WARREN F. BECK,
Plaintiffs,
vs.
JOSEPHUS BULLIVANT, Jr.,
Defendant.

Bill of Exceptions.

Be it remembered, that afterwards, to wit, on the 28th day of October, 1901, at a stated term of said Court begun and holden in the city of Portland, in and for the District of Oregon, before his Honor, Charles B. Bellinger, District Judge, the issue joined in the above stated cause came on to be tried before the said Judge without the intervention of a jury, the parties aforesaid by their counsel having by stipulation in writing duly filed in this court, according to the statute in such case made and provided, expressly waived a jury; the plaintiffs being represented by Mr. T. J. Geisler, their attorney and counsel, and the defendant by Mr. Otto J. Kraemer, their attorney and counsel; and upon the trial of said

(Testimony of Charles H. Wilcox.)

issue, the attorney for the plaintiffs read in evidence the certain stipulation of facts duly filed herein, and thereupon offered in evidence the letters patent set forth in the declaration. And the same was received and marked Plaintiffs' Exhibit "A."

The plaintiffs also offered in evidence one of their said patented books, and the same was received and marked Plaintiffs' Exhibit "B."

And thereupon to further sustain the issues on their behalf, the plaintiffs called as a witness CHARLES H. WILCOX, who, being duly sworn, testified as follows:

I reside at the city of Portland, in the State of Oregon, and I am the Pacific Coast agent for the American Sales Book Company, having my place of business in the Marquam Building in said city of Portland. As such agent I have exclusive charge of the introduction and sale of duplicate sales books manufactured by the plaintiff, American Sales Book Company, under the letters patent of United States, No. 647,934, granted April 24, 1900, to Warren F. Beck, and referred to in the declaration in this case. I have been so in charge of said territory for about two and a half years past, and have sold large quantities of duplicate sales books manufactured by the American Sales Book Company under said letters patent. Within the year ending about August, 1901, I have sold such manifold sales books within my territory to the amount of about 500,000; and large quantities of such books are now in use in such territory. With few exceptions the merchants to whom books were sold by me have reordered the same book.

(Testimony of Charles H. Wilcox.)

(Here witness was shown the book, Plaintiffs' Exhibit "C," duly received in evidence.)

In about the early part of February, 1901, I called on Mr. Bullivant, the defendant, at his store on Jefferson St., Portland, Oregon, and saw him using in his business books like Plaintiffs Exhibit "C," and I told Mr. Bullivant of the patent granted to Warren F. Beck on duplicate sales books; and that the book used by Mr. Bullivant in his store was an infringement upon such patent. I again called on Mr. Bullivant several weeks later, before this action was commenced, and found him still using books like Plaintiffs' Exhibit "C" in his business. Mr. Bullivant may have said that he would just use up the orders which he had bought from Mr. Jarrett of Seattle, and might give me the next order.

FRANK STRAUHAL, being called as a witness on the part of the plaintiffs, testified:

I reside at the city of Portland, Oregon, and am one of the firm of Strauhal Brothers, having a grocery store on Morrison street, Portland, Oregon. I am well acquainted with the duplicate sales book in controversy here. I have used the same for some time in my business.

(Witness is here shown Defendant's Exhibit "A.")

Q. State whether in your opinion such book, Defendant's Exhibit "A," is as convenient in its use as the book manufactured by the American Sales Book Company?

A. We used to use books like this one in our store

(Testimony of Frank Strauhal.)

until Mr. Wilcox showed us some of the plaintiffs' books. Then we adopted the latter, because we liked them better. We are using the Beck book now. The carbon as arranged in plaintiffs' book is better protected, and is not apt to get wet along the edge, and to tear off, if used out of doors.

Defendant moved to strike out that part of the witness' testimony referring to the manner of fastening the carbon transfer-sheet; the only issue being whether a thumbhole in the carbon, or a corner thereof being clipped off, as claimed by plaintiffs' patent, is patentable in view of paragraph 5 of the stipulation of facts. Motion denied. Defendant excepts.

Defendant also introduced in evidence his exhibits "B" and "C," and the same were duly received.

All of said exhibits of plaintiffs and defendant are hereto attached.

And this was all the evidence introduced or offered by either party.

And thereupon the parties, plaintiffs and defendant, rested.

And thereupon the plaintiffs moved the Court for judgment on the facts proved in the case. But the Court refused to grant such judgment, and the plaintiffs duly excepted.

And thereupon the case having been submitted to the Court, the Court made its certain findings of fact and conclusions of law as of record appears.

And the plaintiffs duly excepted to the twelfth finding of the Court as wholly unsupported by any evidence; and further for the reason that such finding is wholly immaterial, and implies the application of an erroneous rule of law.

And the plaintiffs further duly excepted to the conclusion of law found by the Court, and to the decision of the Court giving judgment in favor of the defendant, for the reason that the facts found are wholly insufficient to support said decision, or said conclusion of law, or said judgment. That the said decision and conclusion of law is wholly erroneous, and the granting of judgment to defendant was contrary to the law of the premises.

And forasmuch as the facts aforesaid do not otherwise appear of record, plaintiffs pray that this, their bill of exceptions, may be certified and allowed.

The foregoing bill of exceptions may be settled and allowed as presented.

T. J. GEISLER,
Attorney for Plaintiffs.
OTTO J. KRAEMER,
Attorney for Defendant.

The foregoing bill of exceptions is hereby allowed and ordered filed.

Dated, December 27, 1901.

CHARLES B. BELLINGER,
Judge.

Filed December 27, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And, to wit, on the 17th day of December, 1901, there was duly filed in said court, a petition for writ of error, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

AT LAW.

AMERICAN SALES BOOK COMPANY (a Corporation), and WARREN F. BECK,

Plaintiffs,

vs.

JOSEPHUS BULLIVANT, Jr.,

Defendant.

Petition for Writ of Error.

Come now the plaintiffs, American Sales Book Company, a corporation, and Warren F. Beck, and say that on the 27th day of November, 1901, judgment in this case was entered by this Court in favor of the defendant, and against these plaintiffs, by which said judgment the plaintiffs were aggrieved, in that in said judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of these plaintiffs, all of which will appear more in detail from the assignment of errors filed with this petition and referred to as if herein at length set forth.

Wherefore, plaintiffs appear that a writ of error may be issued to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of; and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to said Circuit Court of Appeals.

Dated at Portland, Oregon, the 14th day of December, 1901.

T. J. GEISLER,
Attorney for Plaintiffs.

Filed December 17, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 17th day of December, 1901, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

AMERICAN SALES BOOK COMPANY (a Corporation), and WARREN F. BECK,
Plaintiffs,
vs.
JOSEPHUS BULLIVANT, Jr.,
Defendant.

Assignment of Errors.

Come now the plaintiffs in the above-entitled case,

and file this as their assignment of errors, referred to in their petition for a writ of error to be issued to the United States Circuit Court of Appeals for the Ninth Circuit; that is to say, in the record and proceedings in the above entitled cause there is manifest error in this, to wit:

1. Error of the Court in not finding as a conclusion of law that the letters patent issued to Warren F. Beck on the improvement in manifold sales books are prima facie evidence of their own validity.

2. Error of the Court in not finding as a conclusion of law that the prima facie validity of the said letters patent issued to Warren F. Beck has not been overcome.

3. Error of the Court in not finding as a conclusion of law that the burden of proof rested upon the defendant on his plea against the lack of novelty, and utility of the patented invention in question, and that every reasonable doubt must be resolved against the defendant in favor of the validity of the patent.

4. Error of the Court in not finding as a conclusion of law that the fact that the defendant did use manifold sales books which were identical with that of the book patented to Beck, is sufficient in itself to establish the utility of said patented invention as against the defendant.

5. Error of the Court in applying as a rule of law a comparative measurement of the advantage, or utility, of the manifold sales books patented to Beck with sales books in use prior to said patented invention.

6. Error of the Court in not finding as a conclusion of law, upon the findings of fact of the Court, namely:

That the patented invention of Beck was not known prior to its discovery by said Beck, and that said invention did possess utility in some degree; that the said patent was valid, and that the books used by the defendant were an infringement of said patented invention, and the plaintiffs herein are entitled to recover.

7. Error of the Court in not finding as a conclusion of law, upon the facts found by the Court, namely: That the invention patented to Beck was extensively practiced; and that large quantities of manifold sales books embodying said patented invention have been sold, and are now in use; that such acceptance by the public is evidence of a high degree of the utility of the invention.

8. Error of the Court in not finding as a conclusion of law, upon the following facts found by the Court, namely:

1. That the improvement patented to Beck was not known, or in use prior to its discovery by said Beck.

2. That said improvement did possess utility in some degree, and 3, that the improvement was readily adopted by the public, and manifold sales books embodying such patented improvement were extensively purchased by the public; that such facts were sufficient in themselves to sustain the novelty and utility of the improvement, and the validity of the patent.

9. Error of the Court in finding as a conclusion of law, that, because the invention patented to Beck possesses no superior degree of utility over other, and previously existing, forms of manifold sales books, therefore, the patent issued to Beck is void for lact of novelty.

10. Error of the Court in applying as a rule of law that the novelty of said invention is to be ascertained by measuring its utility comparatively with prior devices for the same purpose.

11. Error of the Court in finding that the said patent issued to Warren F. Beck of plaintiffs is void for the lack of novelty.

12. Error of the Court in giving judgment in favor of the defendant in this case, on the facts found by the Court.

13. Error of the Court in not giving judgment in favor of the plaintiffs on the facts found by the Court.

14. Error of the Court in not finding that the patent to Beck in question is valid; that the defendant infringed the same, and that the plaintiffs are entitled to recover their damages and costs because of such infringement.

T. J. GEISLER,
Attorney for Plaintiffs.

Filed December 17, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on Tuesday, the 17th day of December, 1901, the same being the 61st judicial day of the regular October Term of said Court—Present, the Honorable WILLIAM B. GILBERT, United States Circuit Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

AMERICAN SALES BOOK COMPANY (a Corporation), and WARREN F. BECK,
Plaintiffs,
vs.
JOSEPHUS BULLIVANT, Jr.,
Defendant.

Order Allowing Writ of Error.

The plaintiffs by their attorney, T. J. Geisler, having on this 17th day of December, 1901, filed and presented to this Court their petition praying for an allowance of a writ of error intended to be urged by them; and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the premises, the Court does hereby allow the writ of error, provided, however, that such plain-

tiffs give a bond according to law in the sum of two hundred and fifty ($250.00) dollars, which said bond shall operate as a supersedeas bond.

Dated at Portland, Oregon, this 17th day of December, 1901.

WM. B. GILBERT,
Judge.

Filed December 17, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 17th day of December, 1901, there was duly filed in said court a bond on writ of error, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

AMERICAN SALES BOOK COMPANY (a Corporation), and WARREN F. BECK,
Plaintiffs,
vs.
JOSEPHUS BULLIVANT, Jr.,
Defendant.

Bond on Writ of Error.

Know all men by these presents, that we American Sales Book Company, a corporation of New York, and Warren F. Beck, plaintiffs, and Charles H. Wilcox, surety, are held and firmly bound unto Josephus Bullivant,

Jr., in the sum of two hundred and fifty dollars to be paid to the said Josephus Bullivant, Jr., his executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated December 14, 1901.

Whereas the above-named American Sales Book Company and Warren F. Beck have petitioned for a writ of error to be issued from, and prayed the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the Circuit Court of the United States for the District of Oregon.

Now, therefore, the condition of this obligation is such, that if the above-named American Sales Book Company and Warren F. Beck shall prosecute said writ of error to effect, and answer all costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

AMERICAN SALES BOOK COMPANY. [L. S.]
By C. H. WILCOX,
Agent.
WARREN F. BECK, [L. S.]
By C. H. WILCOX,
Agent.
C. H. WILCOX. [L. S.]

Signed, sealed and delivered in presence of:
T. J. GEISLER.
E. M. HOWATSON.

United States of America,
District of Oregon. } ss.

I, Charles H. Wilcox, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said District, and that I am worth in property situated therein, the sum of five hundred dollars. over and above all my just debts and liabilities; exclusive of property exempt from execution.

C. H. WILCOX.

Subscribed and sworn to before me this December 14, 1901.

[Seal] T. J. GEISLER,
Notary Public for Oregon.

Approved December 17, 1901.

WM. B. GILBERT,
Judge.

[Endorsed]: Filed December 17, 1901, J. A. Sladen, Clerk.

And afterwards, to wit, on the 2d day of January, 1902, there was duly filed in said court a stipulation and order to transmit original exhibits to United States Circuit Court of Appeals, in words and figures as follows, to wit:

In the United States Circuit Court, for the District of Oregon.

AMERICAN SALES BOOK COMPANY (a Corporation), and WARREN F. BECK,
Plaintiffs,
vs.
JOSEPHUS BULLIVANT, Jr.,
Defendant.

Stipulation and Order Allowing Withdrawal of Exhibits.

It is hereby stipulated that the original exhibits of plaintiffs, "B" and "C," and defendant's original Exhibits "A," "B," and "C," filed in this court, and referred to in the bill of exceptions, may be withdrawn and sent with the transcript to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, December 31, 1901.

T. J. GEISLER,
Attorney for Plaintiffs.
OTTO J. KRAEMER,
Attorney for Defendant.

Upon the foregoing stipulation, it is hereby ordered that the Plaintiffs' Exhibits "B" and "C," and Defendant's Exhibits "A," "B," and "C" in said stipulation re-

ferred to, may be withdrawn from the files of this Court, and forwarded with the transcript to the Appellate Court.

Dated, January 2, 1902.

CHARLES B. BELLINGER,

Judge.

Filed January 2, 1902, J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

Clerk's Certificate to Transcript.

United States of America, }
District of Oregon. } ss.

I, J. A. Sladen, Clerk of the Circuit Court of the United States, for the District of Oregon, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from 3 to 54, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of the American Sales Book Company a corporation, and Warren F. Beck, Plaintiffs and Plaintiffs in Error, vs. Josephus Bullivant, Jr., Defendant and Defendant in Error, as the same remain of record and on file in my office and custody.

And I further certify that the cost of the foregoing transcript is twenty-two 40-100 dollars, and that the same has been paid by the said plaintiff in error.

In testimony whereof I have hereunto set my hand, and affixed the seal of said Court, at Portland, in said District, this 2d day of January, 1902.

[Seal] J. A. SLADEN,

Clerk United States Circuit Court for the District of Oregon.

[Endorsed]: No. 791. In the United States Circuit Court of Appeals for the Ninth Circuit. American Sales Book Company (a Corporation), and Warren F. Beck, Plaintiffs in Error, vs. Josephus Bullivant Jr., Defendant in Error. Transcript of Record. In Error to the Circuit Court of the United States for the District of Oregon.

Filed January 6, 1902.

F. D. MONCKTON,

Clerk.

No. 791

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN SALES BOOK COMPANY (A CORPORATION) AND WARREN F. BECK,
Plaintiffs in Error,

vs.

JOSEPHUS BULLIVANT, JR.,
Defendant in Error.

Brief of Plaintiffs in Error.

T. J. GEISLER,
Attorney for Plaintiffs in Error.

In Error to the Circuit Court of the United States for the District of Oregon.

UNION PRINTING CO., 84-88 FOURTH STREET, PORTLAND, ORE.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN SALES BOOK COMPANY (A CORPORATION) AND WARREN F. BECK,
Plaintiffs in Error,

vs.

JOSEPHUS BULLIVANT, JR.,
Defendant in Error.

No. 791

Brief of Plaintiffs in Error.

This is a Writ of Error directed to the United States Circuit Court for the District of Oregon, to review its proceedings and final judgment in an action brought to recover damages for the infringement of letters patent for an invention. The judgment was for defendant, because the Circuit Court adjudged the patent void, for lack of patentable novelty of the invention involved.

STATEMENT OF THE CASE.

The patent involved was granted to Warren F. Beck of the plaintiffs in error April 24, 1900, No. 647,934, for an improvement in Manifolding Sales Books. A copy of the patent marked Plaintiffs' Exhibit "A," will be found following page 38 of the transcript.

The interest of the American Sales Book Company in the patent in question is founded on an agreement with the Plaintiff Beck, as set forth in the amended declaration (Trans., p. 15) and

admitted in the second paragraph of the Stipulation of Facts (Trans., p. 27), by which the plaintiff company was granted the exclusive right to manufacture the said patented invention.

Manifolding Sales Books are commonly used in stores for taking down, in duplicate, a memorandum of a sale, or order, so that one copy of such memorandum may be delivered to the purchaser, and the other retained as a record of the transaction.

In their general construction, these books comprise an outer cover, a pad of paper, and a carbon sheet to be arranged between any pair of leaves; the leaves of the pad being generally imprinted with a blank form, and numbered in pairs, progressively; one leaf of each pair being the original and the other intended to receive the carbon copy of the memorandum made. At the time of the advent of Beck's invention, manifolding sales books had been in use for a number of years in various forms. The carbon sheet of the earlier styles of books was loose; but this being inconvenient, in the later styles the carbon sheet was attached to the pad or its cover, so that it could not fall out of place. There, however, still remained a serious inconvenience. Whenever the old style book was used, the carbon sheet had to be handled with the fingers. This would soon soil the fingers, and consequently was a source of annoyance. Furthermore, each use of the old style books necessitated three operations: First, the top leaf of the pad, covering the carbon sheet had to be thrown back; second, the carbon sheet had to be lifted by the fingers so as to be able to get at the underlying leaf; and third, the underlying leaves of the pad had to be rearranged. Thus, the required individual lifting of the carbon sheet was not only an annoyance, but also an inconvenience.

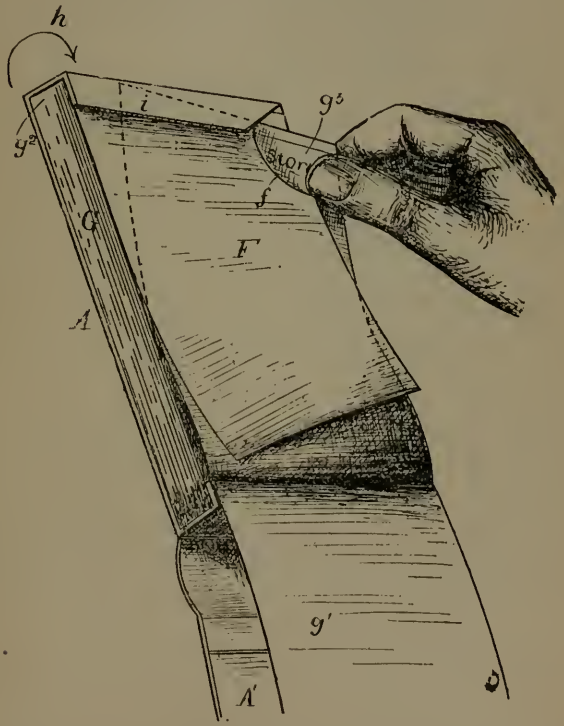
At this stage Plaintiff Beck invented his improvement. And, as such invention is to be considered here, the particular improvement or beneficial effect achieved by Beck in manifolding sales books, was that the carbon sheet is so constructed and combined with the pad, that the individual leaves of the pad may be readily and conveniently withdrawn from under the carbon sheet without

lifting, or otherwise handling the latter. (See lines 19-32, p. 2 of Specification of Letters Patent, following p. 38 of Transcript.) This desirable result had never before been obtained by any practical means. (See 7th Finding of Fact, Trans., p. 32).

The means by which Beck accomplished this result are amply described and illustrated in said Letters Patent. But for the convenience of the Court, they will be here recapitulated.

These means, and the combination and arrangements of the co-operating parts will be seen in the following—

Illustration No. 1 of Plaintiff's Exhibit "B."



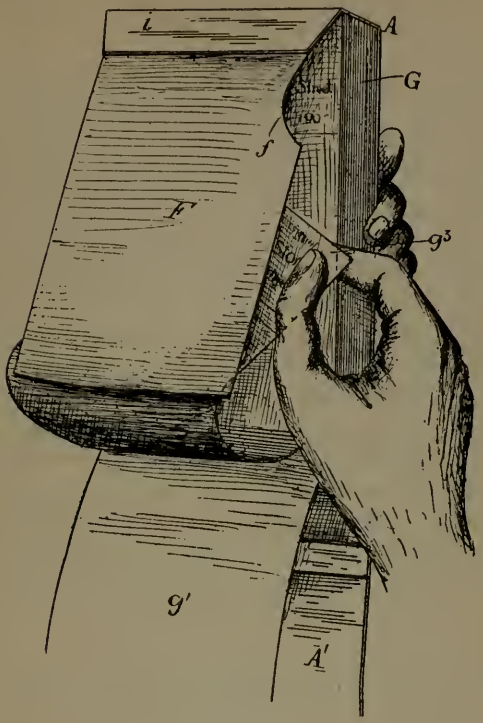
[Note.—There is a discrepancy in the record between the marks used for identifying the exhibits of the parties, as appear-

ing in the Stipulation of Facts (Trans., p. 27), and in the Bill of Exceptions (Trans., p. 36). To make such marks agree, "Plaintiff's Exhibit 'B'" referred to in the fourth paragraph of the stipulation should read "Plaintiff's Exhibit 'C.'" And "Defendant's Exhibits 'A' and 'B'" referred to in the sixth paragraph of such stipulation should read "Defendant's Exhibit 'B'" and "Defendant's Exhibit 'C.'"]

The foregoing is a pictorial reproduction of the Exhibit "B" of plaintiffs, referred to in the Bill of Exceptions (Trans., p. 36). It shows a sample of the manifold sales books manufactured and sold by the Plaintiff Company; the same embodying the particular combination or features patented to Beck with which we have to deal.

Referring to the illustration, and the reference characters thereof: A, A' represent an outer cover, or holder, of convenient style for the pad G. The leaves of the pad are fastened together at their lower ends. In the illustration, the uppermost leaf, g'—which we will suppose is an original memorandum leaf —is turned back so as to disclose the carbon sheet, F, resting on the duplicate memorandum leaf. The carbon sheet, F, is fastened at its upper end, and in such manner as to overlap the free ends (g2) of the leaves of the pad, as indicated by the arrow, h. The upper right-hand corner, f, of the transfer sheet, F, is cut away and thus exposes the corner (g3) of the underlying leaf, the remainder of which is covered by the carbon sheet, and the exposing of the corner, g3, of the underlying leaf operates to allow the latter, when to be withdrawn, to be conveniently seized and manipulated by the hand as shown. The next movement of the hand is shown in

Illustration No. 2 of Plaintiff's Exhibit "B."



Thus, in using the Beck book, only two operations are required. The annoying and inconvenient second operation described above with respect to prior styles of books—the individual lifting of the carbon sheet—was eliminated. In the Beck book the withdrawal of the underlying leaf, g3, was readily accomplished by pulling the same a trifle to one side, as shown in the first of the foregoing illustrations, and then drawing such leaf from under the carbon sheet, as shown in the second illustration, *without in any wise having to handle such carbon sheet.*

Upon the underlying sheet (g3) and the next following original leaf too, having been withdrawn, the carbon sheet would

naturally fall back into position; and then, upon the withdrawn original leaf having been laid back upon the carbon sheet, the book is again ready for use.

It must also be noted from the foregoing illustration No. 2 that there is but little lifting of the transfer sheet, while withdrawing an underlying leaf of the pad. Observe further that the construction and arrangement, or combination, of the pad and the transfer sheet allows the holder therefor to be provided with the shield, i, without in any manner interfering with the described manipulation of the pad. This feature, while not described or claimed in the specification of the invention, nevertheless is a desirable feature rendered possible by the particular combination invented by Beck. The provision of the protecting shield, i, is of much advantage, when the pad is to be used out of doors. Under such circumstances it would protect the hinge-end; that is to say, the fastened end of the carbon sheet. The importance of this feature was testified to by witness Frank Strauhal. (Trans., p. 37). Attention will further be called thereto when discussing comparatively the merits of the invention in question, and the type of manifold sales book placed in evidence by the defendant.

The claims allowed in plaintiff's patent, covering the particular features above dsecribed, are 2 and 3. These read:

"2. The combination, with a manifold-pad, of a holder or cover therefor having a carbon or transfer sheet secured thereto, said transfer sheet being folded over upon the leaves of the pad at their free ends and having a portion cut away to expose a portion of the leaves at or near their free ends for the purpose set forth."

"3. The combination, with a manifold-pad, of a carbon or transfer sheet normally resting upon the top of the pad and overlying the leaves thereof, said transfer sheet having a portion cut away to expose a portion of said leaves at or near their free ends

for the purpose set forth, the leaves at their free ends being otherwise concealed by the transfer sheet."

The Defendant Bullivant keeps a grocery store in Portland, Oregon, and the infringement charged against him is predicated upon his wrongfully and unlawfully using duplicate sales books in his business, which books infringed the said claims of the plaintiffs' patent.

(Paragraph 4, Stipulation of Facts, Trans., p. 27; 6th Finding of Fact, Trans., p. 32.)

Of the existence of such patent defendant had personal knowledge, being informed thereof by plaintiffs' agent (see Testi. of C. H. Wilcox, Trans., p. 37). It may be said, however, that one W. H. Jarrett, doing business at Seattle, in the State of Washington, under the style of Ideal Duplicate Order Book Company, and who was the manufacturer of the infringing books, is the real litigant, as it were. Residing without the District of Oregon, he could not be made a party; but he nevertheless is fighting over the shoulder of defendant Bullivant.

There is no question of identity between the books used by the defendant as stated, and the Beck invention. That was conceded. Such was also the 6th Finding of the Circuit Court above referred to.

The only question to be determined was, whether the improvement for which the patent was granted to the plaintiff Beck was a new and useful *invention* as contemplated by law.

The case was tried before the Court without a jury, pursuant to said written Stipulation between the parties, and found on page 26 of the Transcript.

The Court made its special and separate Findings of Fact and law on the several issues presented, which will be found on page 29 of the Transcript, and on such Findings adjudged the patent invalid, and rendered judgment in favor of the defendant.

From said Findings of Fact, it will appear that there was no question as to the title of plaintiffs under their patent, or that the same had been issued in due form by the Patent Office.

On the question of *novelty* the trial Court found that the improvement of Beck was original and new. This is its finding:

"7. That prior to the discovery by said Warren F. Beck of such patented improvement in manifold sales book, no manifold sales books were made, used or known embodying such particular and patented features or improvements, to-wit, comprising a holder, or cover, and a pad on the top of which normally rests a carbon, or transfer-sheet, said sheet overlying the free ends of the leaves of the pad, and covering the leaf under it; and said transfer sheet having a portion cut away to expose a portion of said leaf under it near its free end, and facilitating the withdrawal of the same from under said transfer sheet, as in said patent described and claimed, and as shown in Plaintiffs' Exhibit 'B.' . . ." (Trans., p. 32.)

On the question of utility, the following Finding of the Court shows that said improvement was abundantly useful:

"10. That in accordance with said agreement between the plaintiffs, American Sales Book Company and Warren F. Beck, said American Sales Book Company has extensively practiced the said alleged patented invention, and manufactured, advertised and introduced throughout the United States manifold sales books embodying said alleged patented improvement; and that in the Northwestern States within the year ending about August, 1901, large quantities of manifold sales books embodying said alleged invention, to-wit: about 500,000 have been sold to merchants and others in said Northwestern territory, and are now in use in said territory." (Trans., p. 33.)

Note also in connection with this 10th Finding the evidence of witness C. H. Wilcox, the Pacific Coast Agent of the plain

tiff company. He, in testifying to the large number of the plaintiff's books now in use, said that *with few exceptions the merchants to whom the Beck book had been sold had re-ordered the same.*

The evidence of the defendant consisted entirely of the facts admitted by said Stipulation of Facts (Trans., p. 26) and certain exhibits. From an inspection thereof, it will be seen that in attempting to substantiate the defense, that Beck's invention was void for lack of patentable novelty, no manifolding sales book, or like contrivance, was offered in which there was to be found any *combination* even remotely resembling the combination patented to Beck. But instead, the defendant offered in evidence sundry *disconnected* and individual devices, in which, by *speculation and inference,* there was to be found certain features remotely suggestive of the form and action of the elements of Beck's combination regarded in their *individual* character.

And the defendant's Exhibit "A" was introduced merely to prove to the Circuit Court, that even if the combination invented by Beck be found to be original and new, yet the beneficial result achieved, that is to say, its utility was of no *sufficient* importance to sustain a patent granted therefor. Because a like effect was obtained in said Exhibit "A" of defendant. The construction of this book is illustrated on page 42 of this Brief, and will be later described. For the present it is immaterial. This book was the immediate predecessor of the Beck book. It had been in use for a considerable time before the introduction of the Beck book; and in a way this book allowed the leaf of the pad underlying the carbon sheet to be withdrawn without touching the latter with the fingers. Since there is no identity of construction claimed between this and the Beck book, its comparative merits will not be referred to for the present. This book the defendant insisted in the Court below was just as good as Beck's book, when considering the modus operandi.

But note, instead of staying with their alleged convictions, soon after the Beck book appears on the market, the defendant

and his manufacturer, Jarrett, throw over the just-as-good book, and make and use books after the principle of the Beck invention. The contention of defendant in support of the utility of his Exhibit "A" was purely verbal argument. He did not go on the stand and so swear. Since he used the Beck book himself; and apparently out of sheer preference, it would have been embarrassing to testify to the contrary. And so he judiciously kept away.

The Circuit Court disregarded in its Findings, the sundry exhibits of defendant, in the sense that it did not hold such exhibits to anticipate the combination of Beck. But, nevertheless, at the conclusion of the trial, the Circuit Court, being in *doubt* on the question of the patentable novelty of Beck's improvement and combination, *resolved such doubt against the patent* and gave judgment for the defendant. The remark of the Court in so disposing of the case is not of record; but the defendant's counsel will agree with me that its substance was: "I do not *think* that this invention is of *sufficient* importance to warrant the grant of a patent therefor." The said doubt of the Court was occasioned wholly, because the trial judge was unable to see, from his standpoint of judgment, any *superior* degree of utility in the Beck invention; in this respect adopting the defendant's contention. That this inference is correctly drawn is apparent from the 12th and last Finding of the Court, viz:—

"12. That the said alleged patented improvement offers no greater advantages or utility than the form of manifold sales books in use in the United States prior to said alleged patented invention, as shown by the evidence, defendant's exhibits, and stipulation herein."

The whole of the criticism of the Court below of Beck's invention is embodied in this 12th Finding; yet, the single fact which the Court marked thereby—the fact that, in the judgment of the Court, the Beck combination failed to present any *superior degree* of advantage or utility over the form of manifolding sales books previously used—the Court considered so vital, so strong

an indication of the lack of patentable novelty, of said combination and improvement of Beck, that the patent therefor granted must be declared void. In other words, the inference inevitably to be drawn from the context of said 12th Finding, is that the Court below erroneously assumed as a rule of law, controlling its decision on the question, as to whether the Beck improvement was the product of invention, that it must delicately poise the utility of the Beck book in comparison with pre-existing manifolding books; and if to the mind's eye of the Court the scale did not show the utility of the Beck improvement to be decidedly *greater* than that of the other devices, then the Court must find that the subject-matter lacks legal novelty, and that no patent granted therefor can be sustained.

It is further evident that in so weighing the *degree* of utility, and of the novelty of the Beck invention, the Court below *laid aside the weight of the opinions of the innumerable merchants who used the Beck book* PRACTICALLY *in their daily vocations;* also the weight of the judgment of the *expert examiner* of the Patent Office on the same subject, and the weight of the fact that the manufacturer of the defendant's infringing book, Jarrett, thought it wiser *to follow the plan of Beck's improvement* than to continue making and using the prior style of book, which, it is contended, is just as good as Beck's.

On the *facts* as found by the Court, the plaintiffs contended in the Court below that they were entitled to judgment as a matter of law. That whatever *doubts* the Court had on any question must be *resolved in favor of the validity of the patent.* That the grant of the letters patent was *prima facie* evidence of their validity, and the defendant had the burden of overcoming this presumption by convincing testimony.

That *novelty* and *utility* is all that the patent statutes require, as a condition for granting letters patent for any invention or discovery. That the *degree* of utility, or of novelty, or of invention was immaterial. So long as the invention did possess utility,

and novelty, and did require invention, in *some* degree, the requirements of the law were satisfied.

The plaintiffs also argued in the Court below that the act of the defendant in using books which copied all the features of the book patented to Beck estopped him from questioning the utility of the Beck book; because a man cannot deny the utility of a thing which he is actually using.

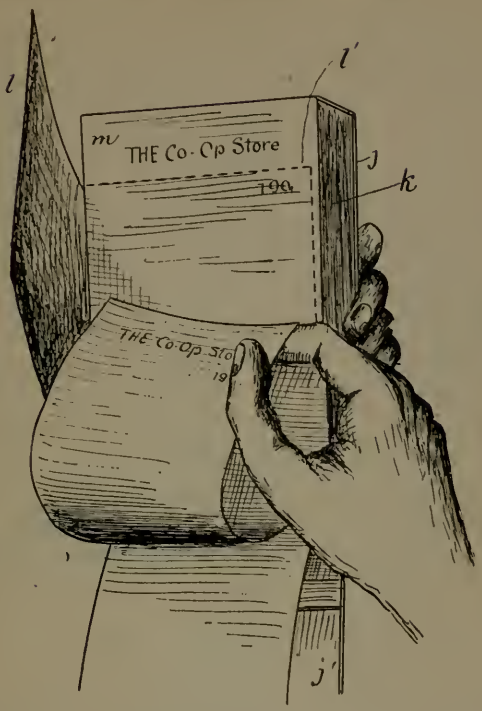
From what has been stated, it is apparent that the issues involved in this action are clearly marked. It will also appear that the defense did not rely on any *existing combination,* but on an imaginary one, which might possibly be built by *speculatively* uniting a number of distinct and disconnected devices. This deduction is apparent from the plea of the defendant (Trans. p. 20), and especially so from the character of the evidence introduced in support of such plea, to which evidence will briefly be referred.

The whole of such evidence consisted of the facts admitted in paragraphs 5, 6 and 7 in the Stipulation of Facts (Trans. p. 26), and of the defendant's Exhibits "A," "B" and "C." Of the paragraphs of the stipulation referred to, the only one which sets forth matter in any wise concerning the novelty of the invention patented to Beck is the fifth.

"5. That for many years prior to the application for the issuance of letters patent in question on the said invention, duplicate order books were in general use, the same having a carbon sheet, loose or secured in place, for transferring the memorandum of the order written on one sheet to a duplicate sheet or sheets arranged below. *But in none of such books did the carbon sheet have a corner cut away, or a thumbhole, for the purpose stated by said Beck in his specification of said invention forming a part of said patent.*"

When the case came up for trial, the only exhibit introduced by the defendant in amplification of the foregoing paragraph was defendant's Exhibit "A," which is reproduced in the following

Illustration No. 1 of Defendant's Exhibit "A."



This figure represents a type of manifolding sales books, in the market prior to the plaintiff's book, and which, as mentioned, the defendant said was as good as the Beck book, but had nevertheless discarded. The book consists of a cover, j, j', holding a pad, k, and transfer or carbon sheet, l. The latter is attached in any suitable way, so as to normally overlap one side of the pad, and rest on top of the same, as shown by the dotted outline of the transfer sheet, l'. The leaves of the pad are also fastened together at their bottom edges. When in its normal position, the transfer sheet leaves exposed the top portion of the underlying leaf, m, and this may be drawn to one side and seized with the

finger, so as to withdraw such leaf from under the transfer sheet. But note the effect of such operation. The act of withdrawing the underlying leaf causes the transfer sheet to be lifted to a perpendicular position by the edge of the leaf withdrawn scraping along the carbon sheet. Compare herewith the same manipulation of the Beck book, as shown in illustration No. 2 of plaintiff's Exhibit "B," p. 5.

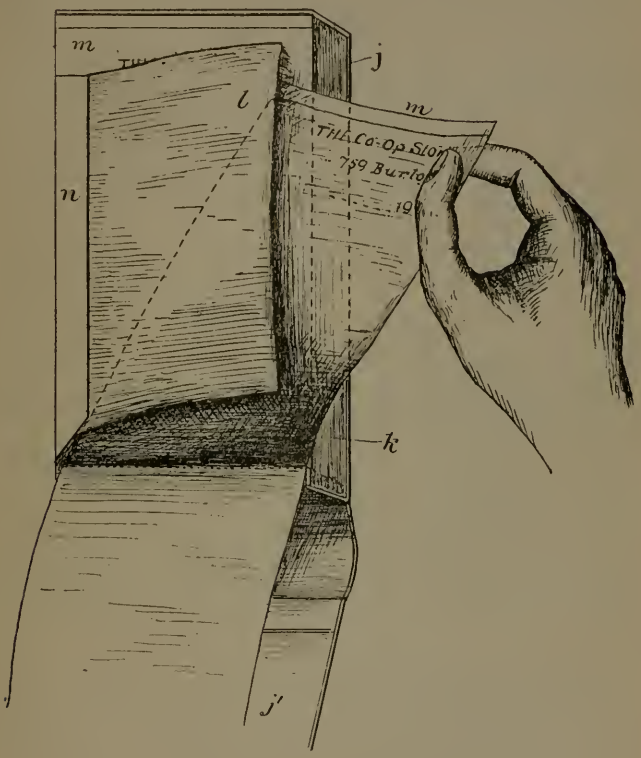
The comparison shows unquestionably that the transfer sheet of a book represented by defendant's Exhibit "A" necessarily receives much more wear than the Beck book.

Now, imagine both types of books being used out of doors in stormy weather. Observe that the Beck book, as apparent from Illustration No. 2 thereof, may be held close to the body, and that the back of the transfer sheet alone is exposed. The underside, or carbon face thereof, is never necessarily exposed. Contrasted herewith, observe that the transfer sheet of defendant's Exhibit "A" *must swing way out*, in order to allow the withdrawal of the underlying sheet of the pad. Thus, it becomes directly exposed to the weather, and that on its carbon face. Defendant's Exhibit "A" represents the style of book Strauhal Bros., grocers in Portland, Oregon, had used until Mr. Wilcox showed them one of the Beck books. (Trans. p. 37.) Then Strauhal Bros. adopted the latter. And why? "Because" (using Mr. Frank Strauhal's words, Trans. p. 38) "we liked them better. The carbon as arranged in plaintiffs' book is better protected, and is not apt to get wet along the edge, and to tear off, if used out of doors."

Observe further that the combination comprised in the Beck book allows the cover, or holder, A, thereof to be provided with a shield, i, to protect the hinge-edge of the carbon sheet, and that this shield in no wise interferes with the use of the book. See Illustrations Nos. 1 and 2 above of plaintiffs' Exhibit "B." Now contrast herewith the provision of a protective shield in the style of book shown by defendant's Exhibit "A."

The effect of such arrangement, if attempted, is shown in the following

Illustration No. 2 of Defendant's Exhibit "A."



n indicates the shield referred to. Note that, with the use of such shield, in order to be able to clear the leaves of the pad from the same, while arranging such leaves with respect to the carbon sheet, the leaf being withdrawn must be pulled way to one side. Certainly an awkward manipulation, exerting quite a strain on one corner of the leaf, and if at all hurriedly done, without having

quite cleared the edge of the leaf from the shield, the leaf will, obviously, be torn. And in placing an original leaf of the pad on the carbon sheet this may readily be done in the Beck book, the narrow end of the leaf will easily slip under the shield. But in defendant's Exhibit "A," provided with a shield, the leaf to be placed must be inserted sidewise under the shield, n, a most awkward and time-consuming operation. Yet the protective shield is of decided advantage. This very provision is one of the features that appealed to Mr. Strauhal, as is apparent from his said remark: "The carbon as arranged in plaintiffs' book is better protected, and is not apt to get wet along the edge, and to tear off, if used out of doors."

A further important benefit resulting from the particular arrangement of the carbon sheet in the Beck book is that such sheet is well adapted to bear, without tearing, any reasonable strain that may inadvertently be imposed upon it, while withdrawing an underlying leaf. The strain so imposed upon the carbon sheet would be downward, and thus directly in line with its greatest resistance. Not so, however, in the type of book shown by defendant's Exhibit "A." Here a like strain would cause a *side pull* on the upper corner of the carbon sheet against the *sharp edge* of the pad of leaves, thus presenting every condition favoring the tearing of the carbon sheet, if accidentally handled as mentioned. Yet, this handling it is liable to receive many times a day in busy stores. All these facts are self-evident.

Briefly describing the two remaining exhibits of defendant: The devices represented by defendant's Exhibit "B" merely show a blank book provided with intermediate transfer or carbon sheets; and the corners of the free ends of the leaves are cut diagonally, so as to project one below the other in steps, evidently for the purpose of facilitating the ready *opening*, or separating, of the leaves of the book at any place.

Defendant's Exhibit "C" shows the same feature in connection with unbound sheets of paper. These are the devices to which

defendant refers in the 6th paragraph of said Stipulation of Facts.

In the 7th paragraph of such Stipulation of Facts, reference is had to the fact that thumbholes are common in the index of ledgers and other books, for the purpose of facilitating the *opening* of the book at any certain page.

Beck's invention had nothing to do with facilitating the *opening* of the sales book at a certain place, manifolding sales books being not so handled.

These exhibits really had nothing to do with the case; and note, there was no finding by the trial Court that either of those book "opening" features were suggestions to Beck of his combination.

To the refusal of the trial Court to allow the motion of the plaintiffs for judgment in their favor, upon the said findings of the Court, the plaintiffs duly excepted; and such exception was allowed.

The plaintiffs also duly excepted to the said 12th finding of the Court as wholly unsupported by any evidence; and further, for the reason that such finding is wholly immaterial, and implies the application of an erroneous rule of law; and such exception was allowed.

And the plaintiffs further duly excepted to the conclusion of law found by the Court, and to the decision of the Court giving judgment in favor of the defendant, for the reason that the facts found were wholly insufficient to support said decision, or said conclusion of law, or said judgment; that the said decision and conclusion of law were wholly erroneous, and the granting of judgment to the defendant was contrary to the law in the premises. And said exception was also allowed.

And thereupon the plaintiffs duly filed their petition for a Writ of Error in order that the said errors of the Court below

might be corrected in this Court; and such Writ of Error was duly allowed.

Together with the plaintiffs' petition for said Writ of Error, the plaintiffs filed the following

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ASSIGNMENT OF ERRORS.

1. Error of the Court in not finding as a conclusion of law that the letters patent issued to Warren F. Beck on the improvement in manifold sales books are *prima facie* evidence of their own validity.

2. Error of the Court in not finding as a conclusion of law that the *prima facie* validity of the said letters patent issued to Warren F. Beck has not been overcome.

3. Error of the Court in not finding as a conclusion of law that the burden of proof rested upon the defendant on his plea against the lack of novelty, and utility of the patented invention in question, and that every reasonable doubt must be resolved against the defendant in favor of the validity of the patent.

4. Error of the Court in not finding as a conclusion of law that the fact that the defendant did use manifold sales books which were identical with that of the book patented to Beck, is sufficient in itself to establish the utility of said patented invention as against the defendant.

5. Error of the Court in applying as a rule of law a comparative measurement of the advantages, or utility, of the manifold sales books patented to Beck with the sales books in use prior to said patented invention.

6. Error of the Court in not finding as a conclusion of law, upon the findings of fact of the Court, namely: That the patented invention of Beck was not known prior to its discovery by said Beck, and that said invention did possess utility in some degree; that the said patent was valid, and that the books used by the

defendant were an infringement of said patented invention, and the plaintiffs herein are entitled to recover.

7. Error of the Court in not finding as a conclusion of law, upon the facts found by the Court, namely: That the invention patented to Beck was extensively practiced; and that large quantities of manifold sales books embodying said patented invention have been sold, and are now in use; that such acceptance by the public is evidence of a high degree of the utility of the invention.

8. Error of the Court in not finding as a conclusion of law, upon the following facts found by the Court, namely: (1) That the improvement patented to Beck was not known, or in use, prior to its discovery by said Beck; (2) that said improvement did possess utility in some degree, and (3) that the improvement was readily adopted by the public, and manifold sales books embodying such patented improvement were extensively purchased by the public; that such facts were sufficient in themselves to sustain the novelty and utility of the improvement, and the validity of the patent.

9. Error of the Court in finding as a conclusion of law that, because the invention patented to Beck possesses no superior degree of utility over other and previously-existing forms of manifold sales books, therefore the patent issued to Beck is void for lack of novelty.

10. Error of the Court in applying as a rule of law that the novelty of said invention is to be ascertained by measuring its utility comparatively with prior devices for the same purpose.

11. Error of the Court in finding that the said patent issued to Warren F. Beck of plaintiffs is void for the lack of novelty.

12. Error of the Court in giving judgment in favor of the defendant in this case on the facts found by the Court.

13. Error of the Court in not giving judgment in favor of plaintiffs on the facts found by the Court.

14. Error of the Court in not finding that the patent to Beck in question is valid; that the defendant infringed the same, and that the plaintiffs are entitled to recover their damages and costs because of such infringement.

And on such Assignment of Errors the following main points arise:

ARGUMENT.

I.

That it is apparent from the face of the record of this case that the trial Court failed to recognize the *force* of the rule of law, that a patent for an invention is *prima facie* evidence of the existence of all the facts essential to is validity. And hereunder:

(a) That the force of this presumption in favor of patents for inventions is as potent as the presumption of the innocence of a person charged with crime.

(b) That the decision of the Patent Office on the question of the patentable novelty of the Beck invention is entitled to the highest respect, and that no proof was presented to the Circuit Court to justify the reversal of said judgment.

(c) That the patentee is entitled to the benefit of every doubt, and that the proof offered to overcome the presumption that the thing patented is the product of invention should not have been accepted as sufficient to satisfy or *convince* the mind against such presumption.

(d) That the patent statutes were enacted to reward industry; and, therefore, they are to be liberally construed, so as to protect the smallest invention like the greatest. That the law has no such standard as *degree* of utility, or of novelty, or of invention. If *novelty*, *utility* and *invention* exist in the *slightest*

degree, that is sufficient. The importance of the result achieved merely concerns the recompense of the inventor.

II.

That, the patent in question being granted to Beck for inventing a new and useful combination in manifolding sales books, though it be true that the individual elements of the combination are old devices, that does not affect the patentability of the *union* of such alleged old devices for a new and beneficial purpose. The thing must be considered in its *entirety* only. And hereunder:

(a) That there is scarcely a patent granted that does not involve the application of old things to a new use; but the merit consists in being the *first* to make the application, to show how it can be made, and its utility.

(b) That the question is not whether the elements are new, *but whether the combination is new;* that the defendant had the burden of proof to show that a *combination* like the one invented by Beck existed before Beck's invention.

(c) That the fact that the improvement patented to Beck was not in use or known prior to his invention thereof, together with the fact of the ready acceptance and extensive use of the same, when offered to the public, is *strong* evidence that it must have required invention to produce said improvement; otherwise it would surely have been adopted before.

(d) That proof of what *might* have been done cannot be received. The question is what *was* done before. The law will not accept conjecture, but *demands certainty.*

"Prophecy *after* the event is easy prophecy."

III.

That "utility is suggestive of originality," and that the fact that the Beck manifolding sales book has gone into general use, displacing other books, is strong evidence that the patented im-

provement was the product of an inventive act, *and is sufficient to turn the scale in any question of doubt.* And hereunder:

(a) That the meaning of the word "useful" in the patent law is that the invention shall have *some* beneficial use. The *degree* is immaterial.

(b) That the fact that the defendant used, and his manufacturer made, out of sheer preference, manifolding sales books pirating the Beck invention, is conclusive as against them that they thought the Beck book superior to any other; that infringement is only undertaken when there is utility in the thing infringed.

(c) There is no such test as comparative utility, hence the twelfth finding of the Court on the question of utility implies and assumes an erroneous rule of law; and it is manifest from the record that the trial Court allowed such erroneous rule of law to control its judgment in the premises.

IV.

That there was no evidence produced by the defendant of the existence of any combination remotely resembling the combinations patented to Beck, and the facts found by the Circuit Court are wholly insufficient to support its said conclusion of law, and its said judgment for defendant. And the granting of judgment to defendant on said facts was contrary to the law of the premises.

V.

That the motion of plaintiffs for judgment in their favor on all the facts as proved, and found by the Circuit Court, as of record, should have been allowed, and the denial of such motion by the trial Court was error.

I.

THAT IT IS APPARENT FROM THE FACE OF THE RECORD OF THIS CASE THAT THE TRIAL COURT FAILED TO RECOGNIZE THE FORCE OF THE RULE OF LAW, THAT A PATENT FOR AN INVENTION IS PRIMA FACIE EVIDENCE OF THE EXISTENCE OF ALL THE FACTS ESSENTIAL TO ITS VALIDITY.

In other words, from the grant of the letters patent the law presumes, among other facts, that the subject-matter patented was the product of an inventive act, and the patentee is entitled to the benefit of every doubt.

Robinson on Patents, Vol. 3, Sec. 1016, and cases there cited

In the first blush, the statement of the foregoing rule of law—being so well established—seems unnecessary. We all know it so well that it seems quite preposterous to contend that it was disregarded by the Court below. Yet this fact will be demonstrated. To make myself clear, the position of the plaintiffs is, that the result arrived at by the Court below could not have been reached by any possibility, had the rule of law above stated been applied.

Throughout the contentions to be decided in this case, the following propositions, obvious factors in the judgment of the Court below, must never be lost sight of:

1 That the thing invented by Beck had never before been made, known or used (7th Finding of Fact, Trans., p. 32);

2. That the thing so produced had utility, being immediately adopted and extensively used by the public;

3. That the Court below thought it an uncondonable fault of the thing patented that, as it impressed the Court, it failed to show a *superior degree* of advantage;

4. That on the question of the *degree* of utility, the Court below held to its own views against the weight of the fact of

said acceptance and extensive use, and the expert judgment of the Patent Office;

5. That, notwithstanding the Court below had found *affirmatively* on the question of the extrinsic *novelty* and *utility* of the thing patented, yet being in *doubt* whether such thing was the product of an *inventive act,* adopted as a rule of law that it must accept the fact of the lack of *superior degree* of utility, which the Court had discerned as conclusive in establishing the lack of the *legal* novelty and patentability of Beck's invention.

With these propositions before us, it is apparent that said presumption of law being given its full weight, no difficulty could have been found in deciding the question of invention involved. It was only when losing sight of this presumption that this case, like any patent case, can be made to assume the complication of the most abstruse theories.

The defendant in error will argue that the presumption of law invoked is disputable. No doubt of that. But let us consider the ordinary import of such presumption. Presumptions of this class we know are the result of general experience; inferring certain facts from the proved existence of another fact. "In this mode the law defines the nature, and the amount of evidence which it deems sufficient to establish a *prima facie* case, and to throw the burden of proof on the other party. . . ." (Greenleaf on Evid., Vol. 1, Sec. 33.)

This class of presumptions "has been adopted by common consent, from motives of public policy, and for the promotion of general good." (Ib. Sec. 34.)

Now, in considering this presumption as applied to patents for inventions, let us further examine why patents for inventions, under our system, are *prima facie evidence of the existence of all facts* essential to their validity; why this presumption, as applied to such patents, would promote the general good. In this examination we shall see that the presumption of the validity

of a patent for inventions has not been adopted as a mere *expediency* or *convenience*. No, indeed; much greater import is to be attached to it.

"No patent is issued without an *examination* at the Patent Office by persons *skilled* on the subject. . . . The commissioner is entrusted by law with the power and duty of granting patents for new and useful inventions. He is authorized to grant a patent only for a new and useful invention, or improvement, and it is to be presumed that he has performed his duty."

Bump on Law of Patents, p. 253, and authorities cited. And see, to same effect, Union Sugar Refinery Co. v. Matthiesen, 24 Fed Cases, 686, 688.

In Cook v. Ernest (6 Fed. Cases, 385 389) the Court said, while the decision of the Commissioner of Patents, on the question of novelty, "is not entitled to the force of *res adjudicata,* yet it is a determination entitled to the *highest* respect of the Courts and should not be reversed, *except upon the most satisfactory proof.*"

In Smith, et al., vs. Woodruff, (22 Fed. Cases, 703.) The Court said: "The Court is greatly relieved, and will be so all the way up to the Court of last resort, by presumptions in favor of the finding by the (Patent) Office, to which is entrusted the determination of the question of patents."

And when, as in the case, the defendant is unable to produce any anticipating devices, than such as in the very nature of things must have been known and considered by the Examiner of the Patent Office, when he determined that the improvement in question was novel and patentable, then the judgment of the Patent Office is even strengthened, and should be confirmed.

The presumption in favor of the patent on the question of patentable novelty is not of the class in which any trifling, possibly countervailing, evidence will turn the scale, and the burden of proof.

This distinction is well stated in Untermeyer v. Freund, 37 Fed. Rep. 343, where the Court, being in doubt, said:

"To state the proposition as fairly as the defendants can expect, the issue upon this branch of the case is involved in uncertainty. If the defendants' right to recover a sum of money in an ordinary action at law depended upon their establishing the affirmative of this issue, a verdict in their favor would, probably, not be disturbed by the Court. *If, however, the complainant's conviction of a crime depended upon the establishment by the prosecution of the same proposition, a verdict of guilty could hardly be sustained.*"

The patent in question was sustained.

See, also, Walker on Patents, Sec. 76. And,

Cluett, et al., v. Claflin, et al. (30 Fed. Rep. 922), where the Court said: "A voluminous mass of testimony has been returned upon the question of prior use. The greater part, however, may be laid aside, when it is remembered that this defense must be established by proof as explicit and convincing as that required to convict a person charged with crime; proof which *preponderates* the complainant's testimony *not only*, but which *satisfied the mind* BEYOND *a reasonable doubt.*"

There is another very potent reason for extending to patents for inventions the full effect of the presumption in its favor as above laid down.

Our patent system is based upon a desire to reward those who have a progressive spirit, and devote their energy to improving the conditions of things. The advance made by an inventor must, however, be relatively considered. All inventions are efforts to satisfy some want which is perceived to exist.

"The want may not have been apparent until some previous efforts, partially or imperfectly satisfying the more universal want, disclosed the subordinate and narrower need. Every successive improvement substitutes a better condition of affairs; and at the same time brings to light imperfections still to be overcome.

As the end has become narrower and more special, the scope of the means devised to meet it necessarily becomes correspondingly contracted. Yet it is evident the narrowest and most technical invention which is devised to fill such special want is also entitled to protection."

(Robinson on Patents, Vol. 1, Sec. 88, Note 2.)

Hence, the law "has no nice standard by which to gauge the degree of mental power or inventive genius brought into play in originating the new device. A lucky, casual thought involving a comparatively trifling change often produced decided and useful results, and though it be the fruit of a very small amount of inventive skill, the patent law extends to it the same protection as if it had been brought forth after a lifetime devoted to the profoundest thought and the most ingenious experiments to attain it."

Middleton Tool Co. v. Judd, 17 Fed. Cases, 276.

Robinson on Patents, Vol. 1, Sec. 83.

The magnitude of the result achieved merely concerns the recompense of the invention.

Now, we will instantly agree that this doctrine is sound. But, as soon as it is to be applied to the case before us, a wide gap springs up between the plaintiffs and defendant—a chasm that always did and always will exist on like questions. It is so simple a matter to have widely different opinions on so obviously simple propositions. Thus, note in this case the divergence of the trial judge from the opinion of the Examiner of the Patent Office, who allowed Beck's patent. Both merely acted upon the exhibits of devices so well known to everybody that the conclusion is inevitable, the Examiner had in mind the very same devices claimed to be so suggestive of Beck's invention as to render it unpatentable. This being so, the judgment of the Court below merely overruled the views of the Examiner, and declared unpatentable what the Patent Office had recognized as worthy of such

protection; it could not agree with the Examiner that the change accomplished by Beck was of sufficient importance to grant a patent therefor. The Court had a *doubt*, and instead of resolving its doubt in *favor* of the patent, the Court below resolved its doubt *against* the patent, and held it void.

"No more difficult task is imposed upon the Court in patent causes than that of determining what constitutes invention, and of drawing the line of distinction between the work of the inventor and the constructor. The change from the old structure to the new may be one which one inventor would devise with the expenditure of but little thought and labor, and others would fail to accomplish after long and patient effort. It may be one which one whose mind is fertile in invention will suggest almost instantaneously, when the skilled hand of the constructor will fail to reach the apparently simple result by the long and toilsome process of experiment." (Pearl v. Ocean Mills, 19 Fed. Cases, pp. 56, 59.)

Hence, now we can see clearly the wholesomeness of the rule of law above referred to, and which is so well stated in the case of Kirby v. Beardsley, 14 Fed. Cases, p. 660: "This difficulty (distinguishing between invention and construction) in connection with the general merit of inventors, as contributors to the material interest of society has inclined Courts to give *a liberal construction to the law, so as to protect every contrivance that can be called new, that proves at all useful. Care has been taken to give the benefit of doubt, as to originality, or creative thought, to the inventor, so as to nourish inventive enterprise by lending encouragement to every degree of merit.*"

And, to give this beneficial rule of law its full effect, Courts will not allow the presumption of law in favor of patents for inventions to be overcome by proof of the alleged anticipating thing founded on *speculation*. The law will not be satisfied with conjecture, but *demands certainty*.

Coffin v. Ogden, 18 Wall, 124.

The character of the proof required in cases involving "combinations" will be further considered under following points.

II.

THAT, THE PATENT IN QUESTION BEING GRANTED TO BECK FOR INVENTING A NEW AND USEFUL COMBINATION IN MANIFOLDING SALES BOOKS, THOUGH IT BE TRUE THAT THE INDIVIDUAL ELEMENTS OF THE COMBINATION ARE OLD DEVICES, THAT DOES NOT AFFECT THE PATENTABILITY OF THE UNION OF SUCH ALLEGED OLD DEVICES FOR A NEW AND BENEFICIAL PURPOSE. THE THING PRODUCED MUST BE CONSIDERED IN ITS *ENTIRETY* ONLY.

Beck's invention, as has already been stated, concerned the improvement and the perfection of manifolding books; and one of his objects was "to provide means for manipulating the leaves of the pad without touching the transfer sheet with the fingers." The means by which Beck attained his object have been described and illustrated above. (See Supra, p. 3-7)

As we have to examine this invention, the idea of means and mode of operation presented was:

The combination with a manifold-pad of a carbon, or transfer-sheet, possessing the following relative and distinguishing characteristics:

(1) The transfer sheet is so arranged and secured as to normally rest upon the pad, overlying the free ends of the leaves thereof; (2) the carbon sheet has a portion cut away, to expose a corner of the free end of the leaf under it, so that such leaf may be seized by the fingers, at such exposed portion, and withdrawn from under the transfer sheet, without touching the latter with the fingers.

These features are specified in Claims 2 and 3 of Beck's patent as follows:

"2. The combination with a manifold-pad of a holder or cover therefor having a carbon or transfer sheet secured thereto,

said transfer sheet being folded over upon the leaves of the pad at their free ends, and having a portion cut away to expose a portion of the leaves at or near their free ends for the purpose set forth."

"3. The combination, with a manifold-pad, of a carbon or transfer sheet normally resting upon the top of the pad and overlying the leaves thereof, said transfer sheet having a portion cut away to expose a portion of said leaves at or near their free ends for the purpose set forth, the leaves at their free ends being otherwise concealed by the transfer sheet."

The combination comprising the elements of Claim 1 were not in controversy, and should not have been included in the judgment of the Court below at all. The judgment of the Court below should have been confined exclusively to Claims 2 and 3, and the patent left intact as far as Claim 1 was concerned.

The inventive enterprise of Beck being directed to a limited field, more could not be expected than the satisfaction of such wants as such field would disclose. Yet, the simple invention which satisfied that limited want is certainly entitled to protection.

In the old style of manifolding sales books three operations were required in each use of the manifolding pad: First, throwing back the top leaf of the pad covering the carbon sheet; second, *lifting the carbon sheet up*, so as to be able to get at the underlying leaf; third, arranging the underlying leaves. In the Beck improvement the *second* operation was *dispensed* with.

Being obliged to handle the transfer sheet, one would soil the fingers; so here was one undesirable feature overcome. Incidentally, Beck also obtained a most complete, efficient, simple, practical and desirable manifolding sales book. The latter fact is abundantly attested by the ready manner in which the Beck book has been adopted by the general public. Over 500,000 were sold in a single year, even the defendant and his manufacturer falling into line, too.

While Beck in his specification and claims did not confine himself to the particular arrangement shown in the drawing forming a part of his patent application, the latter represent his preferences. Fastening the transfer sheet at the top end, so as to hang down over the pad, is unquestionably the better arrangement. This is the plan followed by plaintiff company in practice, as apparent from the illustration of plaintiffs' Exhibit "B." The infringing books of defendant copied this identical arrangement.

Before the advent of Beck's improvement, the undesirable and awkward second operation of old-style manifolding books was sought to be, and in a measure was, overcome by the construction represented by defendant's Exhibit "A." This was the form in which the manifolding books were made for *"many years"* before the advent of Beck's improvement. (Latter part of Finding No. 7, Trans., p. 32.) This is the book which defendant claimed was just as good as that contrived by Beck. But, what happens when the Beck improvement is placed before the public? The maker of the defendant's just-as-good book, Jarrett, immediately discards it, and pirates the combination devised by Beck. Does the *motive* of Jarrett have to be commented upon?

Now, we are told that the whole invention of Beck was a sham. All Jarrett had to do was just to instruct his workmen to make a book like Beck's and it would be done. But why did he not give such instructions? Because Jarrett did not realize the *susceptibility* of the component parts of a manifolding book *until he had himself been first instructed by the Beck invention.*

Beck's invention was merely an improvement of existing manifolding books, and the improvement was obtained by a *new and useful combination.*

It is to be observed that the defendant, in assailing the novelty of such combination, placed in evidence every imaginable contrivance that could have the remotest bearing on the *factors* of the

combination. But what did it amount to? Did the rigorous search of defendant reveal a carbon sheet in any device, in which it *functiated*, as in Beck's book? Is it not manifest from the record of such attempts in this case that, outside of the sphere of manifolding sales books, there was no occasion found for adapting the carbon sheet to functionate as it must in the Beck invention?

The Exhibits "B" and "C" of defendant are mere absurdities, as evidence on the questions involved. A *loose* carbon sheet of any form would be absolutely useless as an element of the Beck combination. And where is the similarity between the function of a carbon sheet having a corner clipped off, so as to facilitate the *separating* of the underlying leaves at any place, and the function of the carbon sheet in the Beck book, facilitating the *withdrawal* of an underlying leaf? In the Beck book, as shown in the draiwngs, and as copied by the defendant, the cutting away of a portion of the transfer sheet occurs *near its fastened end.*

What have "thumbholes," or their function as used in the indices of ledgers and other books, to do with the question? Yet, these silent, disconnected references of the defendant constitute his whole defense.

"A thing is substantially the same as another if it performs substantially the same function, or office, in substantially the same way to attain substantially the same result; *and things are substantially different when they perform different duties in substantially a different way, or produce a substantially different result.*"

> Union Sugar Refinery Co. v. Mathiesen, 24 Fed. Cases, 689, 696.

But what have we to do with all these things, any way? The rule of law governing the patentability of combinations is very clear. *"It will not answer to say the combination required no invention, . . . because . . . any mechanic might have selected the parts and combined them.* The same might be

said, with equal force, in almost every instance in which a patent for a combination is issued." The fact that no one else *did* select and combine the parts and produce a book like Beck's, notwithstanding its apparent utility, as gathered from its immediate and extensive adoption, is a sufficient refutal of the suggestion.

306
Dederick v. Cassell, 9 Fed. Rep. 309.

"Where a patent is for a new combination of existing machinery or machines, . . . proof that *any part* of their structure existed before forms no objection to the patent, for the reason that the invention is *limited* to the combination." Moody v. Fiske, et al., 17 Fed. Cases, 655, 657.

On the same question, the Supreme Court has said (Imhauser v. Bueck, 101 U. S., 647,660): "Before entering upon a separate examination of these several patents it is proper to remark that it is not pretended that any one of them embodies the *entire* invention secured to the complainant in his letters patent. Nothing of the kind is pretended, but it is insisted that each contains some feature, device or partial mode of operation corresponding in that particular to the corresponding feature, device or partial mode of operation exhibited in the complainant's patent. Suppose that is so, still it is clear that such a concession cannot benefit the respondent, it being conceded that neither of the exhibits given in evidence embodies the complainant's invention, or the substance of the apparatus described and claimed in his specification. Where the thing patented is an entirety, consisting of a single device or combination of old elements incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another part in another prior exhibit, and still another part in a third exhibit, and from the three or any greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the patented improvement."

In Robinson on Patents, Vol. 1, Sec. 155, p. 220, the following rule concerning combinations is laid down and supported by unquestionable authorities:

"While every element remains a unit, retaining its own individuality and identity as a complete and operative means, their *combination* embodies an entirely new idea of means, and thus becomes *another unit*, whose *essential attributes* depend on the *co-operative union* of the elements of which it is composed. . . . Whether the elements are *new or old . . . is of no importance. To unite them* in a *new* means by the exercise of inventive skill is invention, and renders the combination, *as an entirety*, the subject-matter of a patent."

In Blake v. Stafford (3 Fed. Cases, 614), Shipman J. said: "Considerable was said on the argument touching the fact that some or all of the elements included in the plaintiff's combination are old. But this is not material. The question is not whether the *elements* are new, *but whether the combination is new*, . . . though the separate parts are all as old as the art of mechanics. . . . It is needless to remark that originality may be found as well in new combinations of old elements as in the production of new ones."

Admitting, therefore, that clipping a corner off a carbon sheet is old, and that, of course, the combination of a pad and carbon sheet is old, too, it nevertheless is evident that Beck in his combination obtained an effect never before accomplished in the art of making manifolding sales books; and a much-desired effect, too, no doubt, for was it not imitated as soon as put into practice by Beck?

"If the patentee borrowed the idea of the different parts which go to constitute his invention, and for the first time brought them together, into one whole, and that whole is materially different from any whole that existed before, then he is the original and first inventor, and is entitled to a patent therefor." Many v. Sizer, 16 Fed. Cases, 685.

And as an answer to a possible argument by the defendant, that the use of a carbon sheet, with a corner clipped off to uncover a portion of the underlying leaf, as in Beck's book, is merely a *new use of an old thing*, and, therefore, not patentable, may be effectively repeated the words of Blatchford D. J. in Strong, et al., v. Noble (23 Fed. Cases, 249). The patented invention considered was the use of "a knit fabric for the cover of the handle or other portion of a whip." One of the defenses was that the invention was not patentable, because it appeared that knit fabrics were known and used for various purposes before, and that the application of the same for the purpose of the patentee was merely the application of an old article to a new use. The Court, holding that "the conclusion by no means followed the premises," said: "The first defense set up is that the invention patented is not a patentable invention; that . . . it is merely applying . . . an old article to a new use, in the sense of which, in the law of patents, the mere application of an old article to a new use is held not to be the subject of a patent. Such applications are of this character—using an umbrella to ward off the rays of the sun, it having been before used to keep off the rain; eating peas with a spoon, it having been before used to eat soup with; cutting bread with a knife, it having been before used to cut meat with. To apply the principle here invoked would render void the mass of patents that are now granted. There is scarcely a patent granted that does not involve the application of an old thing to a new use, and that does not, in one sense, fail to involve anything more. But the merit consists in being the first to make the application, and *the first to show how it can be made, and the first to show that there is utility in making it.*" The decree was for the complainant.

Now, this is precisely the argument of the defendant here. They say that, because it is shown that clipped carbon sheets and likewise thumbholes have been previously used for one purpose, there is no patentable difference in their use for any purpose.

In Forbush, et al., v. Cook, 9 Fed. Cases, 423–425, Mr. Justice

Curtis in his charge to the jury said: "Some witnesses have testified that in their opinion it did not require invention to devise this combination. Other witnesses have expressed the opposite opinion. The true inquiries for you to make in this connection are whether the combination made . . . was new and useful. If it was new and useful within the meaning of the patent law, it was the subject-matter of a patent, and it is not important whether it required much or little thought, study or experiment to make it, or whether it cost much or little time, or expense, to devise and execute it. If it was a new and useful combination of parts, and he was the first to make the combination, *he is an inventor*, and may have a valid patent. . . . To be new in that sense, some new mode of operation must be introduced. *And it is decisive* evidence, though not the only evidence, *that a new mode of operation has been introduced, if the practical effect of the new combination is either a new effect or a materially better effect.* . . A new or improved . . . effect, attributable to the change made by the patentee in the mode of operation of existing machinery, *proves that the change has produced a new mode of operation, which is the subject-matter of a patent: and when this is ascertained, it is not a legitimate inquiry, at what cost to the patentee, it was made, nor does the validity of the patent depend on an opinion formed* AFTER *the event respecting the ease or difficulty of attaining it.*"

The test of the inventive act is not its apparent simplicity after having been disclosed, but the prior absence of the means or end attained, though evidently desirable.

In Hoe v. Cottrell (1 Fed. Rep., 597,602), Shipman J. said: "In the determination of the question whether there was invention in any particular combination, the important thing is to ascertain whether novelty and utility existed. It is true that these requisites may result from mere mechanical skill, and a new and useful combination may be formed by the mere mechanical addition of an old member to an old set of members; *but, when a*

device has a new mode of operation which accomplishes beneficial results, 'Courts look with favor upon it,' and are not exacting as to the degree of inventive skill which was required to produce the new result."

Now, applying the propositions of law above stated to the case and questions before us: Supposing it to be conceded that manifolding sales books were made prior to the invention of Beck, which were just like the Beck book in all respects, except that the carbon sheet thereof did not have a portion cut away, near its fastened end, for exposing a corner of the upper portion of the underlying leaf of the pad; and supposing, further, that the idea of so cutting away a portion of the carbon sheet was suggested by "thumbholes," and that the susceptibility of a sheet of carbon paper to allow a corner to be so cut away was suggested by another device, be it what it may, it is obvious that neither of these facts has anything to do with the Beck invention. Such invention lay wholly in the particular union, under a particular law of co-operation, to obtain the particular beneficial effect desired. This effect, as has been shown, was the elimination of the annoying finger-soiling and inconvenient time-consuming second operation required in the old style of book; but by means differing from and more practical than those by which such result was attained in the style of book represented by defendant's Exhibit "A." Of course, anybody might have accomplished the same combination of the same parts, and the same beneficial effect as Beck did. The same is true of any kind or class of invention. But the fact is no one did contrive such combination, because they failed to realize and perceive the susceptibility of the individual elements of the old book to adapt them to said new and beneficial result; and Beck being the first to perceive this, to him was lawfully granted his patent therefor.

In Lee, et al., v. Blandy, et al. (15 Fed. Cases, 142-144), the Court said that one well-recognized class of patentable combinations was

where "all the parts were before known, and . . . the sole merit of the invention consists in such an arrangement of them as to produce a new and useful result." And see, to same effect, Fuller v. Yentzer, 4 Otto. 288, 296. And Robinson on Patents, Vol. 1, Secs. 155, 156.

The same propositions were again before the United States Supreme Court, in Loom Co. v. Higgins (105 U. S. 591). The Court said: "It is further argued . . . that . . . the devices . . . do not show any invention; . . . that the combination set forth is a mere aggregation of old devices well known, and, therefore, it is not patentable. This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed—one which would occur to any mechanic skilled in the art. But it is plain from the evidence, and from the very fact that it was no sooner adopted and used, that it did not for years occur in this light to even the most skilled persons. It may have been under their very eyes—they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. . . . Now that (the combination) has succeeded, it may be very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule . . . that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention."

III.

THAT "UTILITY IS SUGGESTIVE OF ORIGINALITY," AND THAT THE FACT THAT THE BECK MANIFOLDING SALES BOOK HAS GONE INTO GENERAL USE, DISPLACING OTHER BOOKS, IS STRONG EVIDENCE THAT THE PATENTED IMPROVEMENT WAS THE PRODUCT OF AN INVENTIVE ACT, AND IS SUFFICIENT TO TURN THE SCALE IN ANY QUESTION OF DOUBT.

When we speak of the *utility* of a patented invention, what do we mean?

The definition is concisely given in the case of Cook v. Ernest, 6 Fed. Cases, 385, 389:

"All the law requires as to utility is that the invention shall not be frivolous, or dangerous. It does not require any *degree* of utility. It does not exact that the subject of the patent shall be *better* than anything invented before. . . . If the invention is *useful at all,* that suffices. To warrant a patent, the invention must be useful—that is, capable of some beneficial use, in contradistinction to what is pernicious, frivolous, or worthless. . . . The invention should be of *some benefit.* . . . The *degree is not pertinent* to the question of the validity of a patent. . . . It is sufficient if the invention have *any* utility."

The relative value of the patented invention concerns merely the patentee.

See Robinson on Patents, Secs. 341, 342, and cases cited.

But, notwithstanding this comprehensive rule, we will nevertheless assume that there are instances in which the utility of an invention, as a basis for a patent, may be comparatively examined with other devices, so as to aid the Court in distinguishing between what utility is the product of mechanical, and what of inventive genius. Where now are we to find a rule that will guide Courts through the maze of doubt? In the first place, we have such rule in the force of the presumption, which, as above explained, attaches to all letters patent for invention regularly granted by the Patent Office, an action which, as we have seen, carries with it the high respect due to the expert judgment of the Patent Office official on the same question. A judgment which, in the case before us, must have been based on the identical information—the exhibits of defendant being common knowledge—as was submitted to the Court when the judgment of the Patent Office was reviewed. The opinion of the expert Examiner of the Patent Office deliberately formed with all the facts before him,

might well be assumed to be at least as good as that of the judge presiding at a trial involving a patent. Invention is purely a mental, intangible process, evidenced in any case solely by the effect obtained.

But assuming, for the sake of argnment, that the Court is as much entitled to its opinion as is the Patent Office official; is the property right granted by a patent to be dependent wholly on the uncertainty of human judgment? Is there no further artificial rule which it is safe to follow? Yes, indeed; we have a most wholesome and undisputable rule of law established by the Courts on this very point, and that rule is:

"The utility of the change as ascertained by its consequences is the real practical test of the sufficiency of an invention; and, since the one cannot exist without the other, the existence of the one may be presumed on proof of the existence of the other. Where utility is proved to exist in any degree, a sufficiency of invention to support the patent must be presumed."

This is the rule laid down in Webster on Patents. p. 30. And in recognizing the force of this rule (in the case of Smith v. Goodyear Dental Vulcanite Co., 3 Otto, 486), the United States Supreme Court added:

"We do not say the single fact that a device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, establishes in all cases that the later device involves a patentable invention. It may, however, always be considered; and *when the other facts in the case leave the question in doubt, it is sufficient to turn the scale.*"

"Utility is suggestive of originality," and, in the absence of any other test, "the fact of the *acceptance* of a new device or combination by the public, and putting it into extensive use is evidence that it was the product of invention."

Washburn & Moen Mfg. Co. v. Haish, 4 Fed. Rep., 900, 907.

But even though the question of the utility of the Beck book could be considered under the obviously erroneous principle of law applied by the Court below, who is the better judge of its utility—the numerous merchants who actually use the book in their business, or the judge who casually considered the same on the trial of this cause, from an indifferent point of view? The merchants who used the Beck book were obliged to give the same a *practical* test in their business. And with what result? Mr. Wilcox says (Trans., p. 36): "With few exceptions the merchants to whom (Beck) books were sold by me have *re*ordered the same book." Can there be any stronger test? If these merchants saw nothing in the Beck book after they had given it one trial, would they have *re*ordered the same? Surely, "these circumstances afford a safer criterion of inventive novelty than any subsequent opinion of an expert, or intuition of a judge," as was remarked by Judge Wallace in Palmer v. Johnson, 34 Fed. Rep., 336.

And what about Jarrett, the manufacturer of the infringing book, and the defendant here, the wrongful user thereof? As a proposition of law, they are estopped from denying the utility of the Beck book, because they are actually using it.

Cook v. Ernest, 6 Fed. Cases, pp. 385, 389.

Walker on Patents, Sec. 85, on this subject says: "A patent is *prima facie* evidence of utility, and doubts relevant to the question should be resolved against infringers," because *it is improbable that men will render themselves liable to actions for infringement unless infringement is useful."*

If the Beck combination presented such an attraction as to induce defendant and his manufacturer to assume the risk of infringing the same, and yet the improvement was a mere mechanical change, as they would have us believe, why did Jarrett not make the mechanical change before? Why did he have to wait for the suggestion to come from Beck?

The case of Guarantee Trust & Safe Deposit Co. v. New Haven Gas Light Co. (39 Fed. Rep., 272-273) is pertinent to this inquiry. "The inquiry is whether the adaptability of the Siemen's superheater to fix the gas of the Harkness' patent was self-evident to the intelligence of those skilled in the art. If it had been, why was not the substitution made? It introduced very desirable advantages in the process of making illuminating water gas. . . . If the making of this change had been an obvious thing, falling within the range of ordinary mechanical adaptation, it is probable that those skilled in the art would have sought to avail themselves of its advantages. . . . *The fact that the older organizations which it is now claimed were susceptible of being modified by mere mechanical skill into the apparatus of the patent remained without any such modification until the patentee made it, and his improvement when made was so useful and valuable as to commend itself at once to those skilled in the art to which it relates, is sufficient to resolve any doubt whether the improvement embodied invention in favor of the patent.*"

The immediate extensive use of the Beck book is evidence of the highest grade of its superior utility, and that it must have required invention to produce it, otherwise the change of construction involved would long ago have suggested itself. Robinson on Patents, Sec. 344.

The plaintiffs in error venture to say in behalf of the Beck invention that it not only does not require any defense against the apparent reflection of the Circuit Court upon its utility, but that its *superior* utility is vouched for by all the phases of the case. If it were not so, why this stubborn fight by the defendant in error, and Jarrett, the manufacturer? If the style of book which is represented by defendant's Exhibit "A" is really as good as defendant contends, why did he not continue its use, and Jarrett continue its manufacture? and all difficulty would have been avoided. If the patented invention of Beck is of no particular value, that concerns the plaintiffs alone. All they desire is to

quietly enjoy whatever property they may have in such patent, free from the piracy of designing competitors.

The patent of Beck having been granted for a new and useful *combination*, combinations alone concern us. But, as examples of apparently simple inventions which have been litigated, and sustained by the Courts on like issues as here involved, the following cases are cited:

In Ex parte Pennock (5 Official Gazette, P. 668) the Supreme Court of the District of Columbia, in reversing a decision of the Commissioner of Patents refusing a patent, said: "It is not always safe to consider that there has been no invention because it appears obvious and simple, for simplicity is often the chief merit of a patent."

In the case of Isaac v. Abrams, 13 Fed. Cases, 152, the invention consisted in making a mere change of form in a track broom. The improvement consisted in making the brush of unequal lengths, one part being adapted to brush the surface of the rail, and the longer parts to cleaning either side of the rail. The contention was that brushes with a uniform surface being well known, no invention was required to make one of uneven face—that is, *cutting* away a part of the face of the brush, so as to make a part thereof project beyond the remainder. The Court said: "We cannot take this view of the case. It is not invention to change one well-known material for another, or to apply a well-known process without some adaptation, more than every skilled mechanic could apply, to a new art or subject; but a *change in form* of a machine or instrument, *though slight*, if it works a successful result, not before accomplished in a similar way in the art to which is is applied, or in any other, is *patentable*. There is evidence that this improvement did accomplish such result, and that it was accepted and adopted by the trade, and went into general use." Decree for complainant.

In Washburn & Moen Mfg. Co. v. Haish, 4 Fed Rep., 900, 907, the patent tested was for an improvement in barbed fence

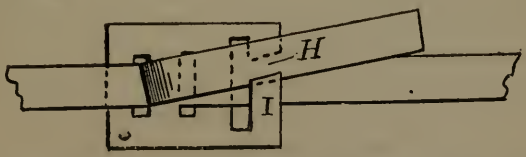
wire. Commenting on the same, the Court said: "The testimony as to the state of the art shows that fence wire, and wire fence, and wire for such purposes composed of two or more strands twisted, or laid together, were old at the time these inventors entered the field; also, that fences had been long before Hunt's invention armed with spikes, or other sharp, projecting points for the purpose of making them more effective in resisting the encroachments of animals and other intruders. Indeed, the thorn hedges which have been used almost from time immemorial are in one sense only a barb fence, their effectiveness as a barrier arising mainly from the natural thorn, or spurs, with which the hedge shrubs are armed. It must be conceded, both from the proofs in these cases, and from the common facts within the knowledge and observation of all intelligent persons, that the idea of furnishing a fence or wall with some kind of sharp spikes, or prickers, is old. . . . The most that can be said of these old devices as applicable to these patents is that the narrow field for the exercise of inventive faculty limits the range of patents. In this connection it is proper to consider briefly the objection that these devices are not patentable from the fact that, in view of what was well known in the same direction, it did not require inventive genius to make any of the devices involved in these patents, but that only mechanical skill was requisite to adapt old devices to this new one. There is no doubt that the device, in order to be patentable, must be the result of inventive genius. The mere mechanical adaptation of old things to new uses is not usually invention, unless in combinations, and yet it is extremely difficult in many cases to say just where the inventive faculty exercises itself as the controlling force. . . . If there is any invention required, then the law will not attempt to measure its extent or degree. If, for instance, the proof had shown that wire provided with barbed spurs, or prickers, was a well-known article used for other purposes than fencing, there would be no difficulty in saying that it did not require invention, or the exercise of inventive faculty to

substitute it for fencing purposes in place of plain wire, which had been used before. But we cannot say that the inventive, or creative, faculty is not required in devising a mode by which plain wire can be armed with spurs, so as to make it available as an effective fencing material. The proof does not show that such wire was known and applied to other uses." The decree was entered in favor of the complainants.

In Howe v. Underwood, 12 Fed. Cases, 670, 685, the Court said: "After having seen what has been done, the mind is very apt to blend the subsequent information with prior recollections, and confuse them together. Prophecy after the event is easy prophecy. I think that this is one of the cases in which several of the witnesses have been led into the illusion of believing that they knew before what they have learned or been taught by Mr. Howe's invention and specification."

In the present case these were not even witnesses who testified for the defendant. The fact of alleged anticipation was left to conjecture of what might or could have been done. But the Circuit Court has evidently committed the very errors against which the foregoing is an admonition. How simple it all seems when we are told how it is done! But Beck did not have any one to tell him.

In Cook, et al., v. Ernest, et al. (6 Fed Cases, 385), the patented invention was for an "improvement in metallic ties for cotton bales." It related to a means for facilitating the securing of one of the turned-back or looped ends of a metallic hoop or band for tying a bale of cotton. This fastening device is illustrated below:



It consisted of a plate comprising three transverse slots and consequently leaving four transvrese bars, or bridging solid por-

tions. The ends of the bands were inserted through the slots, over the bars, and secured as shown. "To avoid the necessity of thrusting the end of the band under the fourth bar, I, the patentee, cut a slit, or opening, H, . . . so that the band, when the slack was fully taken up, and the end was bent over to form the final fastening, could be passed sidewise through the opening into the slot and under the fourth bar, so as to effect the fastening with greater facility and rapidity." (This statement is taken from McComb, et al., v. Brodie, 15 Fed. Cases, 1291, to which the opinion in the case above cited refers.) On an application for a preliminary injunction, Woods Cir. J. said: " . . . To warrant a patent the invention must be . . . capable of some beneficial use. . . . The degree of utility is not pertinent to the question of the validity of the patent. . . . If the defendant has used the patented improvement, he is *estopped* from denying its utility. . . Tested by these rules, the defense of want of utility is clearly untenable. . . . The next defense . . . is the want of novelty. . . . The issue of letters patent is *prima facie* evidence that the patentee was the first and original inventor. . . . The decision of the Commissioner of Patents is entitled to the highest respect of the Courts, and should not be reversed except upon the most satisfactory proof. . . . *Upon the issue of novelty, testimony will not be received to show what* MIGHT *have been done with previous machines.*" Howe v. Underwood (12 Fed. Cases, 699, 685.) It is not enough to defeat the novelty of an invention, that prior contrivances are produced which *might*, with a *little change*, have been made into the patented contrivance, *though not so intended by the maker.* Livingstone v. Jones (15 Fed. Cases, 666). Changes in the construction and operation of an old machine, so as to adapt it to a new and valuable use, which the old machine had not, are patentable, and may consist either in a material modification of old devices, or in a new and useful combination of the several parts. Seymour v. Osborne (11 Wall. 516). The link presented by the affidavits of Wallis and others is an elongated open ring. It is similar to

a device long used for attaching the clevis of a plow to the double-tree, and . . . by farmers for lengthening traces or other chains. The pretense that the prior use of this open link shows want of novelty in Cook's third claim (which covered the slot H in the bar I) is untenable. *It is a device designed to accomplish no such purpose as Cook's device, and is not adapted to that end.*" The next exhibit for defendant evidently was a shoe buckle, also having an *open slot*. Concerning this the Court continued: "An examination . . . shows that it was not intended as a fastening for metallic ties, or bands, and that it is so constructed that a metallic band cannot be introduced sidewise through the open slot in the buckle. This, therefore, cannot be claimed as . . . embodying the same principle as Cook's." The injunction was allowed.

The analogy between the "slot" in the "shoe-buckle" in the case last cited, and the "clipped carbon" and "thumbholes" in the case before us is too plain to require comment.

In Lorillard & Co. v. cDowell & Co. (15 Fed. Cases, 893, and followed in Lorillard v. Carroll, 9 Fed. Rep. 509), the invention consisted of tags for marking or distinguishing tobacco in plugs. The tags were cut out of tinned sheet iron, and were of circular form with prongs bent back from their edges, and with marks upon their faces to indicate quality, origin, etc. The tags were placed on the tobacco and by a powerful press the prongs were sunk into the tobacco. The Court said on the question of lack of patentable novelty: "Simple as it is, it, nevertheless, involved reflection and experiment to bring it to practical maturity, and is evident utility indicated by its prompt displacement of other identifying devices, and its very extensive use, even by the respondents, strongly attests its patentable merit." Motion for injunction allowed.

IV.

THAT THERE WAS NO EVIDENCE PRODUCED BY THE DEFENDANT OF THE EXISTENCE OF ANY COMBINATION REMOTELY RESEMBLING

THE COMBINATIONS PATENTED TO BECK, AND THE FACTS FOUND BY THE CIRCUIT COURT ARE WHOLLY INSUFFICIENT TO SUPPORT ITS SAID CONCLUSION OF LAW, AND ITS SAID JUDGMENT FOR DEFENDANT. AND THE GRANTING OF JUDGMENT TO DEFENDANT ON SAID FACTS WAS CONTRARY TO THE LAW OF THE PREMISES.

What is there in the Findings of Fact to uphold the conclusion of law and judgment of the Circuit Court that the patent issued to Beck for his combination is void, for lack of novelty? The Court found the combination was new and that it was actually in use; and the defendant was unable to present any like combination.

The conclusion of the Circuit Court, therefore, is clearly erroneous.

V.

THAT THE MOTION OF PLAINTIFFS FOR JUDGMENT IN THEIR FAVOR ON ALL THE FACTS AS PROVED, AND FOUND BY THE CIRCUIT COURT, AS OF RECORD, SHOULD HAVE BEEN ALLOWED, AND THE DENIAL OF SUCH MOTION BY THE TRIAL COURT WAS ERROR.

The ultimate facts found by the Circuit Court are: That the combination invented by Beck was new and original; that it was capable of, and had actually been put to practical and beneficial use; that it was an improvement of such merit as to cause the defendant, and his manufacturer, to discard all previous books, and to imitate said improvement. On these facts the Circuit Court could arrive at but one conclusion, and that was, that the patent of Beck is valid, and that it has been infringed by defendant; and its judgment should have been accordingly for the plaintiffs.

This is a test case. It is the only way open to the plaintiffs to substantiate their patent. But the mere use of infringing books by defendant is not the plaintiffs' gravamen. It is evident that the defendant in error is either allowing himself to be used as a "cat's-paw" or a dummy for the manufacturer,

Jarrett. Otherwise, there would not have been this litigation. And as to Jarrett, his motive is quite apparent. He seeks, in the attempt to belittle and scoff at the ingenuity and originality of Beck, his only escape from the consequences of his unlawful act.

The judgment of the Court below should be reversed, and the case remanded with instructions on the law of the premises, in order that the plaintiffs may have justice.

Respectfully submitted,

T. J. GEISLER,
Attorney for Plaintiffs in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

AMERICAN SALES BOOK COMPANY (A CORPORATION), AND WARREN F. BECK,
Plaintiffs

vs.

JOSEPHUS BULLIVANT, JR.
Defendant

No. 791

BRIEF OF DEFENDANT IN ERROR.

OTTO J. KRAEMER,
Attorney for Defendant in Error.

In Error to the Circuit Court of the United States for the District of Oregon.

PRESS OF C. H. CROCKER CO. PORTLAND.
1902.

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Counsel for plaintiff having outlined with such detail and at such length his contention in the above entitled action, makes it necessary on the part of counsel for the defendant in justice to his client to answer in full the argument of plaintiffs and to discuss their statement of the case. The discussion and correction where necessary of plaintiffs' statement of the case will all be made in the argument, it appearing that the plaintiffs themselves have to a great extent intermingled same on their part.

The defendant does not question the fact that the plaintiffs are the proper parties; that the patent set forth in their complaint upon which they rely was regularly (not properly) issued, and that if valid he infringed; nor on the other hand does the defendant now, or did he ever, in any way question the utility of the plaintiffs' alleged patent, his sole and only contention being as in his plea set forth,—that the invention, device or combination claimed by the plaintiffs was not new when produced; that it lacked novelty, and is simply a mechanical union of old inventions not requiring any inventive art or genius or producing any new effect entitling plaintiffs to the patent claimed. (See abstract, p. 20.)

Defendant never did question the *prima facie* presumption of the validity of plaintiffs' letters patent; always understood that the burden of proof was upon him, and with that in view presented under the stipulation of facts set forth, the exhibits therein mentioned as evidence of lack of novelty and lack of inventive skill. The plaintiffs, realizing the *exact similarity in* OBJECT, CONSTRUCTION and MODUS OPERANDI of the defendant's Exhibit "A" to their alleged patent, *endeavored to prove that there was novelty and* INVENTIVE SKILL *by introducing evidence of the* SUPERIOR UTILITY of their device over that of which Exhibit "A" was an illustration.

The defendant further claims that the *question of novelty and inventive skill* raised by the issue, was a *question of fact to be determined and the only question in the case.* The judge of the lower court, trying the case upon agreement without a jury, *looked into the facts agreed upon,* THE MERE INCIDENTAL FACTS THAT AMOUNT ONLY TO EVIDENCE BEARING UPON THE ULTIMATE FACT OF THE CASE, THE LACK OF NOVELTY AND LACK OF INVENTIVE SKILL, and decided the issue in favor of the defendant. Defendant contends that this being an issue of fact,

and fact only, the conclusion was not erroneously reached, but was the only conclusion that could possibly have been reached from the evidence; and further, that even though this tribunal should be of the opinion that the lower court erred in its finding of fact, *on a writ of error, only errors of law can be corrected, not errors of fact*, and that the plaintiffs have intermingled as assignments of *error of law* that which if any error at all, would be an *error of fact;* and further, that practically all of *plaintiffs' contentions are based upon a wrong premise or upon wrong premises.*

ARGUMENT.

DEFENDANT'S VERSION OF THE COURT'S FINDING, A WRONG PREMISE.

The premise of plaintiffs' entire argument is wrong. The lower court did not find the combination of Beck's claim to be new and original, or that prior to its discovery by Beck that there was no pad known or used embodying his claims, its finding thereon and reasons.

Answering the argument of plaintiffs, we notice in the first place his claim that under the old style of book in use prior to Beck's alleged patent that one would soil the fingers, and must furthermore exert three separate acts for the purpose of using the old style books, at great annoyance, inconvenience and expense of time.

Plaintiffs claims that the three necessary acts were: first, throwing back the top leaf of pad covering carbon sheet; second, lifting out the carbon by the fingers so as to be able to get at the underlying leaf; third, the rearranging of the underlying leaves of the pad.

The particular improvement claimed to be achieved by Beck in manifolding sales book (see Letters Patent, line 28, p. 2) was that the carbon sheet is so constructed and combined that the individual leaves of the pad might be withdrawn from under the carbon sheet without lifting or otherwise handling the latter.

A great and false premise upon which the plaintiffs rely is that the lower court found this combination to be new and original and never to have been made, known or used prior to Beck's invention, the premise upon which the defendant bases his entire argument. His claim to the premise is set forth on the top of page 8 of his brief, and as fact number 1, page 23 thereof. In what a ridiculous and absurd position the trial judge would have placed himself in finding that Beck's combination was a new and original improvement, and yet lacked novelty. The question in the case as stated by plaintiffs was whether or not it was original and new, or novel. And the court emphatically said, after looking with the assistance of adverse counsel's eyes, mind and logic, into the evidence, that it was neither original nor new, and lacking novelty is void.

To show that there is no such premise upon which to rely, let us see how they substantiate it, for being the one fact, if they are in error as to the effect of the court's finding on this question their case must for that reason alone necessarily fail.

As a basis thereof they rely upon the seventh finding of fact, on page 32 of the transcript. On page 8 of their brief, they set forth at length the purported seventh finding of fact by the court, BUT ONLY THE FIRST PART THEREOF, not the entire finding of fact, and that the said paragraph seven is but one finding is without question by the very language following the extract used by plaintiffs beginning with the word "BUT," and on this finding the plaintiffs claim that on the

question of novelty the trial court found that the improvement of Beck was original and new, but such is not the case. The court said that prior to the discovery of Beck there was no pad known or used embodying the particular and patented features or improvements, to-wit: Comprising a holder or cover and a pad on the top of which normally rested a carbon or transfer sheet, said sheet overlaying the free ends of the leaves of the pad and covering the leaf under it, said transfer sheet having a portion cut away to expose "A PORTION OF" the leaf under it near its free end, and facilitating the withdrawal of same from under the said transfer sheet as in said patent described and claimed and shown in plaintiffs' Exhibit "B." "But," says the court, "for many years prior to the application for the issue of said letters patent of said alleged invention, duplicate order books were in general use in the United States having a carbon sheet loose or secured in place," etc., one illustration of which is defendant's Exhibit "A." And further using the wording of the court to distinctly show the idea in its mind, it states in the very same paragraph: "But in none of such manifolding books did the carbon sheet have A CORNER CUT AWAY OR A THUMB HOLE for the purpose stated by Beck in his specification."

ALWAYS BEARING IN MIND THAT DEFENDANT'S EXHIBIT "A" WAS IN COMMON USE IN THE UNITED STATES FOR MANY YEARS PRIOR TO THE GRANTING OF LETTERS PATENT TO BECK' FOR HIS EXHIBIT "B."

Let us then examine defendant's Exhibit "A" in conjunction with plaintiffs' Exhibit "B," as was done by the lower court, for the purpose of determining whether there is *lack of novelty* in plaintiffs' alleged patent. *The distinction made by the court is that never before was* SIMPLY A CORNER of the carbon cut away or *a* THUMB HOLE put in the carbon

for that purpose, because defendant's Exhibit "A" had neither thumb hole nor a corner cut away to expose a *portion* of the leaves at or near their free ends as claimed by Beck. Otherwise the claim of Beck for his Exhibit "B" and the claim for the defendant's Exhibit "A," were it to be patented, would be identical. To reiterate, Beck's claim, taking No. 3 (the only one claimed by the complaint to exist or have been infringed, see Trans. p. 14), we have the combination with a manifold pad of a carbon or transfer sheet normally resting upon the top of the pad and overlaying the leaves thereof (this is a minute description so far of plaintiffs' Exhibit "B"), said transfer sheet having a portion cut away to expose A PORTION OF said leaves at or near their free ends, the leaves at their free ends being otherwise concealed by the transfer sheet. This is also identical with a description of defendant's Exhibit "A" with one exception. Describing defendant's Exhibit "A," we would say said transfer sheet having a portion cut away to expose (and here is the change) not A PORTION OF said leaves but SAID LEAVES at or near their free ends for the purpose set forth, the leaves at their free ends being otherwise concealed by the transfer sheet. Plaintiffs' claim No. 2 in the patent (if the court intends to consider same, notwithstanding the complaints being silent as to it) is identical with their claim No. 3 with the exception of the fact that the carbon is folded over upon the leaves of the pad at their free ends and the carbon has a portion cut away to expose *a portion of* the leaves *at or near* their free ends for the purpose set forth. This is as identical a description as could possibly be given of our Exhibit "A" were it held horizontally instead of vertically, and to make that work in a horizontal way which formerly worked in a vertical, in a case such as this is without question no invention.

See Olmsted v. Andrews, 77 Fed., 835.

One might say that the mere turning of the book in hand is suggestive of the change and practically the change itself.

The defendant unhesitatingly and emphatically pronounces plaintiffs' illustration of defendant's Exhibit "A" as unfair and unjust to him, but does not want to be understood as imputing either unfair or unjust motives to plaintiffs, or rather to their respected representative. The defendant most energetically asserts that it is absolutely unnecessary to raise the carbon in manipulating his Exhibit "A" any higher than in manipulating Beck's alleged patent, and having neither time, money nor ability to illustrate by cut, the exhibits being before the court, he will by manipulation thereof readily show the truth of his assertions herein, and the fallacy of plaintiffs' claims, illustration and statements that the act of withdrawing the underlying leaf in defendant's Exhibit "A" causes the transfer sheet to be lifted to a perpendicular position, or that it receives more wear than the Beck book; or that the under side of the carbon in defendant's Exhibit "A" must swing way out, or be exposed to the weather on its carbon face; or that the Beck book can be held nearer the body. That the strain on the carbon in the use of defendant's Exhibit "A" is greater than in defendant's Exhibit "B" is also claimed. The strain is identically the same, being outward, which is in reality downward from the place where the carbon is fastened, and is directly in line with the greatest resistance of the carbon. In fact, it is not nearly so much subject to awkward handling as the Beck book.

As CONCLUSIVE EVIDENCE that Beck is trying to appropriate common knowledge as evidenced by defendant's Exhibit "A," see the following specification from his "Letters Patent," lines 8 to 32, page 2. Could a description be more perfect?

"I do not confine myself to the use of the transfer-sheet having a portion cut away for the purpose herein set forth solely in connection with the holder and pad herein shown, as the transfer-sheet of this character may be otherwise fastened in a holder, or it may be pasted to the back of the pad, where such pad is intended to be used alone or in connection with other holders. Also instead of fastening the transfer-sheet at the end of the pad it may be fastened along the side thereof. In fact, my invention in this respect comprises any form and arrangement of pad and transfer-sheet wherein the transfer-sheet if left intact as it lies upon the pad would conceal the free or loose ends of the leaves of the pad, thereby rendering it necessary to lift the sheet in order to withdraw the leaves from beneath it in manipulating the pad, the cutting away of a portion of the transfer-sheet so as to expose a portion of the leaves at or near their free ends enabling this withdrawal to be accomplished without lifting or otherwise handling the transfer-sheet."

Using plaintiffs' language (Brief, p. 32): "A thing is substantially the same as another if it performs substantially the same function, or office, in substantially the same way to attain substantially the same result."

Could the lower court possibly find as a matter of fact any difference between Beck's Exhibit "B" and defendant's Exhibit "A"?

AN IDENTICAL CASE.

The case of Lowenbach v. Hake-Stirn Co. et al., 92 Fed., 661, is identical with the one at bar, and was decided by the Circuit Court of Appeals for the seventh circuit in 1899, affirming the lower court, and quoting its opinion it says:

"The object in view, as stated in the brief of complainant, 'is to provide a book by which an original and one or more copies of a receipt or other record may be conveniently and quickly made by one writing,' and the advantages which are there asserted for the construction (the cutting a portion of the edge from off the permanent leaf) are: 'First, to facilitate opening it quickly at the place of the last entry; second, to make conveniently and quickly the original receipt and one or more copies by a single writing; third, TO FACILITATE IDENTIFYING AND GRASPING THE COPY OR COPIES TO BE DETACHED WITHOUT MOVING OR TURNING BACK THE PERMANENT LEAF ABOVE; and, fourth, to facilitate tearing out the copy or copies without the aid of a straightedge or other instrument.' "

As to the third claim the court states: "(3) *The permanent leaf, 'having a portion of its edge cut off or out, so as to expose part of the leaf below,'* is designed to facilitate turning at once to the place for use. Of this feature the assertion is made on behalf of the patent that it covers any form of cutting the outer edge of the page; that it is immaterial 'which portion of the edge, or which edge of the leaf, is cut away, or what shape is given to the cut or removed portion of the leaf;' and such interpretation is reasonable. But, surely, it was not new at the date of the patent to provide similar devices for ready reference, as in digests, index books, etc."

"The Mott and Carroll patent of 1875, No. 169,828, for an 'Improvement in Account Books,' clearly described a construction in which one corner of the leaves is perforated for removal as the pages are filled, thus indicating the place of last entry. Earnshaw's patent of 1883, No. 283,872, shows provision in a sales book of alternate long and short leaves for the same object, so that 'a salesman can at once get access to the proper sheet and fold thereof preparatory to making a record thereon;'

and in Soesbe's patent of 1875, No. 169,491, and Burwell's patent of 1883, No. 285,794, the same feature clearly appears of alternate long and short leaves in series in which removal in the course of use left exposed the long leaf which is next to be used.

"From these references it is manifest that the several elements of the combination in question are not only old, but are found in prior combinations in which both employment and purpose are analogous. Each element works in the old way, and for its accustomed purpose. No new function is given to either by the combined use. It is a mere aggregation of elements, which may produce better results, but not 'by their collocation a new result,'—the indispensable requirement for a patentable combination."

The claim of Beck as the "DISTINGUISHING CHARACTERISTIC" of his combination in his own wording at page 29 of his brief is (1) the transfer-sheet is so arranged and secured as to normally rest upon the pad, overlying the free ends of the leaves thereof; (2) the carbon sheet has a portion cut away, to expose a corner of the free end of the leaf under it SO THAT SUCH LEAF MAY BE SEIZED BY THE FINGERS AT SUCH EXPOSED PORTION AND WITHDRAWN FROM UNDER THE TRANSFER SHEET WITHOUT TOUCHING THE LATTER WITH THE FINGERS.

It will thus be seen that Beck's claim is identical with the claim of Lowenbach, and that they both related to carbon copying receipt or record books, and that if the court will look into the proof relied upon to defeat Lowenbach's patent, all of which is set forth in the opinion, it will see that same is not by far so strong as that upon which the defendant relied to defeat the patent of Beck. In this very case do they refer to the similarity

of thumb holes and corners cut from leaves when used in digests, index books, etc., to their use by Lowenbach for the same purpose as did Beck. Of course in the Beck patent the leaf corresponding to the permanent leaf in the Lowenbach patent is the permanent carbon.

It will further be seen by the foregoing decision *that it is immaterial which portion of the edge or which edge of the permanent leaf is cut away, or whether the shape given to the cut be round, square or oblong.*

The plaintiffs then discuss the minor exhibits of defendant, and they by agreement being before the higher court, need no further discussion on defendant's part, in view of the above opinion.

Plaintiffs having referred to the 5th stipulation of facts, the court will notice that the admission is that in none of the books in use prior to the Beck patent did the carbon sheet have *a corner cut away, or a thumb hole.* Defendant's Exhibit "A" has neither a corner cut away nor a thumb hole. An entire strip is cut off, so saving much carbon. Other reasons for the stipulation are above given. Plaintiffs might with as much force have said that by the fifth stipulation defendant, attacking the novelty of plaintiffs' patent, admitted it to be new, original, etc.

Then plaintiffs' on page 9 of their Brief, in attempting to sustain said premise, state that "No manifold sales book, or like contrivance, was offered in which there was to be found any combination *even remotely resembling the combination patented to Beck*, but instead, the defendant offered in evidence sundry disconnected individual devices in which by speculation and inference there was to be found certain features remotely suggestive of the form and action of the elements of Beck's combi-

nation regarded in their individual character." Again, on page 12, they say "Defendants did not rely upon any existing combination, but an *imaginary one, which might possibly be built by speculatively uniting a number of distinct and disconnected devices.*" From the trouble that defendant's Exhibit "A" has justly caused the plaintiffs, and their beautiful cuts thereof, with which we have before dealt, *it seems to be much more real than imaginary.* The defendant cannot comprehend how the plaintiffs should make any such statements as the foregoing in view of their Exhibit "A." But the plaintiffs, realizing the great weight as evidence of defendant's Exhibit "A," ingeniously state immediately thereafter that it was introduced merely to prove to the Circuit Court that even if the combination invented by Beck be known to be original and useful, yet the beneficial result achieved its utility was of no sufficient importance to sustain a patent granted therefor. To put it mildly, *the plaintiffs are emphatically and unmistakenly mistaken.* Defendant's counsel, if any one, should know why the said exhibit was introduced, and introducing it, he did not need to, nor did he rely for his reason upon what plaintiffs might assign. Exhibit "A" was introduced because, as heretofore stated and afterward admitted by the plaintiffs, and also as found by the court in its Findings No. 7 (Trans., p. 32), the same was the immediate predecessor of the Beck book, and was in use many years prior to the appearance of the Beck book; and, of course, as heretofore shown, we claim that it was identical, being composed of the identical devices used by Beck, constructed in the same way, for the same purpose, and operating in the same way. Then do the plaintiffs try to further avoid the effect thereof by saying that "since there is no identity of construction claimed between defendant's Exhibit 'A' and the Beck book, its comparative merit will not be referred to."

I will admit that in the court below defendant claimed the book to be "as good as" the Beck book, when considering the

modus operandi. We claimed that and much more, as is above shown, and the Court found full merit in the claim.

I.

It is apparent from the face of the record of this case that the trial court DID NOT fail to recognize the *force* of the rule of law, that a patent for an invention is *prima facie* evidence of the existence of all the facts essential to its validity.

(a) Plaintiffs claim the reverse, and in the face of the claim state that we all know it so well that the claim seems quite preposterous that the lower court could so err. It is worse than "quite preposterous" to make any such contention, when they urged with much force, eloquence and authority such to be the rule in the lower court; and further considering that the defendant never did question such presumption, and realized that the burden of proof was upon him.

This claim should be negatived in view of all that has preceded in this brief.

Untermeyer v. Freund, 37 Fed. Rep., 343, and *all the cases cited by the plaintiffs* in support of the weight of the presumption as to the prima facie validity of Letters Patent *go to the testimony as to the actual prior and known use, or existence of the device, or devices, claimed as anticipating.* And the court unquestionably requires proof of their *alleged anticipation* to be weighty, not founded on speculation. IN THE CASE AT BAR, THE DEVICES AND COMBINATION RELIED UPON AS ANTICIPATING AND IDENTICAL WITH THE BECK CLAIM ARE ADMITTED TO HAVE BEEN IN USE FOR MANY YEARS PRIOR.

In point is the language following that quoted by counsel in the 30 Fed. Rep., 922: "A voluminous mass of testimony has been returned on the question of prior use. * * * The evidence is full of contradictions and improbabilities, and furnishes another illustration of the difficulty of arriving at the truth from human testimony. Although corruption, prejudice and self-interest may be wholly absent, it is well-nigh impossible for a witness no matter how intelligent he may be, or how retentive his memory, to recall the details of ordinary transactions occurring fifteen or twenty years before. Even the most intelligent and incorruptible witnesses are here proved to be mistaken in important particulars, and others, not so intelligent or virtuous, are contradicted and discredited." By reason of the foregoing state of affairs are the courts so careful as to the avoiding patents on unsatisfied testimony of witnesses as to *anticipating devices.*

To the same effect is Coffin v. Ogden, 18 Wallace, 124, (cited by plaintiffs).

The true rule now in vogue is laid down in 156 U. S., p. 342, in the case of Palmer v. Conning. The court with the presumption of the validity of letters patent in mind is compelled to examine the question of invention *vel non* upon its merits in each particular case. Also Adams v. Bellaire Stamping Co., 28 Fed., 360-2.

(b) Looking at the cases cited by counsel in examining the authorities upon which the plaintiffs rely to show the great weight that should be given to the views of the Examiner at the Patent Office, we find they all state in substance that when the defendant is unable to produce any anticipating devices, other than such as in the very nature of things must have been known and considered by the Examiner of the Patent Office, more weight should be given to his decision than otherwise.

And in most of those cases, if not all, have the plaintiffs tried to prove lack of novelty, or inventive skill, by reason of prior patents which must have been brought to the attention of the Examiner in passing on the later patents in question. But our Exhibit "A" represents "a combination" identical with the Beck book, and was never patented. It was only common knowledge, and the idea that the same was "unquestionably" in the mind of the Examiner at the Patent Office when he granted the Beck patent, is as ridiculous as the idea that all people "unquestionably" know all law and rules of law, no matter how complicated, which they are presumed to know; or that all men who the law presumes to be innocent are "unquestionably" innocent; or that all negotiable instructions presumed to have passed for a valuable consideration "unquestionably" did so.

Thousands of patents are declared void each year by the courts reversing the views of the Examiner.

In Reckendorfer v. Faber, 92 U. S., 347, see top page 352, the court, in passing upon the patentee's urging in his support the views of the Commissioner on Patents, says: "The defense of want of novelty is set up every day in the courts, and is determined by the court or the jury as a question of fact *upon the evidence adduced* and NOT *upon the certificate of the Commissioner on Patents.*"

To better understand the weight as to the presumption as to validity of letters patent and the opinion of the Examiner of Patents, the courts on an examination of the patent frequently declare them void upon their face, even though their validity be not questioned by the defense:

Slawson v. Grand St. Ry. Co., 107 U. S., 649.
Brown v. Piper, 91 U. S., 37, 44.
Dunbar v. Myers, 94 U. S., 187.
Richard v. Chase Elevator Co., 158 U. S., 299.

(c) Though the proof offered to overcome this presumption has been thoroughly argued under defendant's claim of plaintiffs' premise being wrong in the statement of the case and in (a) and (b) just preceding, counsel having stated what an improvement over existing devices will be sufficient to sustain a patent, it is well to note what the recent cases have to say as to what improvements will *not* sustain a patent, should this tribunal care to retry the question of fact passed upon by the lower court wherein it stated that there was no improvement in the Beck patent over existing devices and that it lacked novelty.

In Atlantic Works v. Brady, 107 U. S., 192, at page 200 the court says: "To grant to a single party a monopoly or every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences. The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or

operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed

liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith."

The same language is cited with approval in Slawson v. Grand St. Ry. Co., 107 U. S., 649; Thompson v. Boisselier, 114 U. S., p. 1, and cases cited on page 12.

II.

In answer to Defendant's I (d), and III (a), (b) and (c).

Utility as a basis for a patent not questioned.

Reasons for "Finding No. 12" of court on comparative utility.

The court's *doubt???*

The plaintiffs state that the only question to be determined was whether the improvement for which the patent was granted to Beck was a new and useful invention, as contemplated by law. The defendant has narrowed, and will narrow the only question by eliminating any doubt as to the *question of utility*. We did not raise the question by our pleadings, or in the lower court, and most assuredly do not do so now.

The principal evidence moving the court to find as a matter of fact that Beck's alleged invention (his Exhibit "B") lacked novelty was the defendant's Exhibit "A." And the plaintiffs well realizing not only the similarity but identical likeness of said combinations, being familiar with the rule of law, that if they could show Beck's device to possess greater utility than its predecessor, defendant's Exhibit "A," the court might hold that by reason of such superior utility, it was sufficient evidence of novelty, to uphold the patent notwithstanding. On that theory, and for no other reason, was the evidence of *superior* utility

(*introduced by them*) admissable. Sec. 344 of Robinson on Patents, page 468 (cited by the plaintiffs): "Where doubt arises concerning the identity of inventions, and whether the apparent diversities between them are formal or substantial, the *superior utility* of one *may* be sufficient to remove the doubt, for though the apparent difference be simply the difference in the usefulness thereof, the results may be great enough to demonstrate that, notwithstanding all external similarities, such variations must exist between the modes of operation, that the ideas which they embody cannot be the same."

It must, however, be borne in mind, as stated in Sec. 344 of Robinson on Patents, page 470, that "*There are two kinds of utility*, and the relation of these two kinds of utility, *actual utility* and *comparative utility*, to the two questions of novelty and inventive skill is often much confused through failure to regard the real distinctions obtained between them. *But they are utterly dissimilar in character, and in effect, as well as in the principles upon which those relations are established;* and their real value in affording a solution of these questions is lost whenever the distinctions above set forth are ignored." See point "C," page 22, plaintiffs' Brief, and it will be noticed that this distinction is ignored by them.

To apply the above section to the case in question, the issuing of letters patent to Beck was presumptive evidence that the combination claimed by him was useful. That utility, *the utility as a basis for a patent*, we did not controvert. The *other utility*, the greater (comparative) utility claimed for it over defendant's Exhibit "A," we did controvert, because it was introduced, not for the purpose of proving utility as a basis for a patent, *but as evidence of novelty;* and the novelty claimed by Beck in his combination was the fact in issue.

The remark as to the defendant not having testified in his own behalf as to the utility of his Exhibit "A," is answered by the fact that the same is self-evident, and, being so confident of the absolute identity, he knew no meritorious distinction could be drawn between them by any witnesses who might testify for the plaintiffs. Their last remark further shows that plaintiffs did not understand the meaning of "utility" as hereinafter shown.

Paralleled only by the foregoing claims is the one that the Circuit Court, being in doubt on the question of patentable novelty in Beck's invention, resolved the doubt against the patent. The case must be tried upon the record, as I understand the law, and not only was there no doubt, but there is nothing justifying any such inference of doubt. If there was any doubt in the mind of the trial court as to the facts, it could have been shown of record, for the Findings were submitted to plaintiffs' representative, and every suggestion consistent with the facts which they desired was embodied therein. In fact, the Findings on *Record* were prepared by the adverse counsel. It is claimed that defendant's counsel would concede that the trial judge in disposing of the case stated that he did not think the invention of sufficient importance to grant a patent therefor. We make absolutely no such concession, though the court did not see why, in the face of defendant's Exhibit "A," there was any difference justifying the patent for Beck's claim.

It is further claimed that this doubt was occasioned because the trial judge could find no superior degree of utility in the Beck invention, and the 12th Finding of Fact is cited in support thereof. I have heretofore explained why the 12th Finding of Fact was made. *It was made simply to pass upon the* COMPARATIVE UTILITY introduced as evidence of NOVELTY. And in the very face of the plaintiffs having themselves introduced evidence of utility only for the one purpose

for which it was admissible in this case (to assist in determining the question of novelty), they have the audacity to say that the inference inevitably to be drawn from the context of the 12th Finding is that the court below erroneously assumed a rule of law controlling its decision as to whether the Beck improvement was a product of invention. That it must delicately poise the utility in comparison with pre-existing books, and if the scale did not show the utility of Beck's improvement to be greater, then the court must find lack of novelty, and the patent void.

The 12th Finding of the court is criticised in the Brief as being unsupported by the evidence. Suffice is to say that no error is assigned in any of the fourteen different assignments that does in any way question but what the finding as to Beck's invention possessing any greater utility than defendant's Exhibit "A," is correct as a question of fact. *The exceptions all go to the propriety of the court in taking into consideration the very question of fact that they so strenuously strove to establish as evidence of novelty.*

Strauhal's testimony is then commented upon, and the court must bear in mind that he is the *only one* of the customers buying *about* 500,000 books in one year from Wilcox, who will testify that *he liked* the Beck book better than defendant's Exhibit "A," *not that he actually thought them better, or that they were better, but simply that he liked them better.* And why? Because, having apparently been schooled in the plaintiffs' claims, he gives as the only reason for his preference that the carbon is more apt to get wet and tear off *if used out of doors.* According to their star witness the books are on a par indoors.

In order that Strauhal could properly recite his lesson, plaintiffs, realizing the weakness of their case, did not introduce in evidence a book made under the claim of their patent (See

Fig. 1 Letters Patent, before p. 39 of the Abstract), but used one with a shield, and lay great stress upon the point that such an OUTSIDE PROPOSITION *is possible* under their patent, but not under the scheme of defendant's Exhibit "A." And by such immaterial and far fetched propositions they try to discriminate. If it is desired to further protect the carbon from the weather than is done in defendant's Exhibit "A," the books are made having the cover overlapping the pad from the same side as that to which the carbon is fastened, instead of at the top.

Particularly in point as to Strauhal's testimony is the quotation from 37 Fed. Rep., 343, cited by plaintiffs. "Light can be thrown on a controversy where the court can see the witnesses and observe their manner while testifying. A witness may convince all who hear him testify that he is disingenious and untruthful, and yet his testimony when read my convey a most favorable impression. The trial jury, or judge sitting as a jury, is the one to weigh the question."

For the effect of Strauhal's testimony at best see number (2) following.

Judge Bellinger in the trial of the case now before this court found on that question of utility (comparative utilty), it being a question of fact of which he was the sole judge, that Beck's alleged invention was no more useful, and no better than the combination evidenced by defendant's Exhibit "A."

Should this tribunal determine that it has the right to disturb such finding, before doing so we must remember:

"The rules of evidence in actions for infringement as to the . . . effect of testimony . . . in the Federal Courts are those recognized and followed by the courts of the state in which the Federal Court is held." Robinson on Patents, Sec. 1008.

Also are the rules of evidence the same as to *the effect of a verdict or finding of fact in an action at law in the U. S. Circuit Court.* Foster's Fed. Practice, Sec. 374, p. 556.

Therefore, the law of the State of Oregon in this respect is material, and there a finding of fact by a trial court in a law action will not be disturbed on appeal, if there is ANY evidence to support it.

> Liebe v. Nicolai, 30 Oregon, 364. (48 Pacific, 172.)
> Bartel v. Nathies, 19 Oregon, 483.

Plaintiffs in their brief admit that there is evidence to support the findings, but claim that same was *not sufficiently strong* to overcome the presumption of validity of letters patent.

The conclusions of a judge on a patent case are more reliable and more weighty than those of a jury. Robinson on Patents, Sec. 1182, and note.

III.

REVIEWING POINT 11 OF PLAINTIFFS.

1. When is the combination of old devices so novel as to be patentable or an invention? When is it a mechanical change only?

2. The effect of holding Beck's claim an improvement over defendant's Exhibit "A."

(1). All heretofore said bears much upon this point, yet must we remember that novelty consists in the *substantial* variation of the combination in question from all combinations which in contemplation of law are already open to the public. Robinson on Patents, Sec. 222.

A substantial variation would be an invention. Therefore, to understand the above question, let us see what invention is.

"Invention is the product of original thought. It involves the spontaneous conception of some idea not previously present to the mind of the inventor. Industry in exploring the discoveries and acquiring the ideas of others, wise judgment in selecting and combining them, mechanical skill in applying them to practical result—none of these are creation—none of these enter into the inventive act. Only when the mind of the inventor originates an idea new to himself, if not to the world, does he call into exercise his inventive skill and perform the mental portion of the inventive act." Sec. 78, Robinson on Patents.

Here it might be well to call attention to the fact that "the inventive act necessary to sustain a patent really consists of two acts; one mental, the conception of the idea; the other manual, the reduction of that idea to practice. Neither alone is sufficient." Robinson on Patents, Sec. 77.

The idea generated in Beck's mind as the mental part of the inventive act was to avoid handling the carbon with its attendant benefits. This identical idea was in vogue for many years before in defendant's Exhibit "A." The application of the means for the purpose of securing this end as the result of his inventive act and the essence of his patent he claims to be a *thumb hole or cut in the one corner of the carbon.* The very same means had been employed in defendant's Exhibit "A" by cutting a little more than a thumb hole or a corner. In fact, the entire top of the carbon, making a great saving of carbon, the most expensive part of these manifold pads, and exposing not only a portion of the leaves at their free ends but the entire leaves at their free ends, as heretofore explained.

"Invention indicates genius, and the production of a new idea. Mechanical skill is applied to an idea and suggests how it may be modified and made more practical."

New York Belt & Packing Co. v. Magowan, 27 Fed., 362.

The standard of skill is being constantly raised, and the standard of invention is as a necessary consequence correspondingly raised.

Wilcox v. Bookwalter, 37 Fed. Rep., 224.

Many v. Sizer, 16 Fed. Cases, 685, and all other cases cited by the plaintiffs in the very extracts chosen and quoted as most favorable to them show that if the patentee borrowed the idea of the different parts which go to constitute his invention and for the *first* time brought them together into one hole and that hole is *materially* different from any other hole that existed before, then he is the original and first inventor. To prevent a combination from being patentable it is not necessary that all of its elements shall be found in the same relation and combination in one prior patent or device for the mere bringing together of old devices or elements, especially if they belong to the same or kindred arts without producing anything new in result, function or mode of operation is not patentable. See ———— v. ————, 80 Fed. 528. Beck not only did not bring these separate devices together, but in defendant's Exhibit "A" they were already found together performing the same function and result, and even by the same mode of operation.

2. Supposing, however, the lower court erred in its finding of fact and this tribunal can correct such error, it would still make no difference as to the outcome, for the most that can

possibly be said for the Beck claim is that it is a mere difference in degree, if better than defendant's Exhibit "A." The means by which it was done, to-wit, cutting a hole, or a strip from the overlaying carbon, was a known means, and the way in which it permitted the underlying leaf to be withdrawn was a known way. At most, a result more perfect than had theretofore been attained, a mechanical improvement, and such claims have repeatedly been held invalid:

Schroeder v. Brammer, 98 Fed. 881.

Thompson v. Belltaire Stamping Co., 28 Fed. 360.

Guid v. Brooklyn, 105 U. S. 550.

Wright v. Yung Ling, 155 U. S. 47.

Smith v. Nichols, 21 Wallace, 112.

And using the language of the court in the last case cited, Beck's combination (if an improvement) "would be a mere carrying forward, or a new or a more extended application of the original thought; a change only in form, proportions or degree; the substitution of an equivalent doing substantially the same thing in the same way by substantially the same means, but with better results. This is not such invention that will sustain a patent. This rule, of course, applies alike whether the preceding devices were covered by a patent or rested only in the public knowledge and use."

That the *superior utility*, even though it had been established, *would have been ONLY EIDENCE* of novelty, but not conclusive evidence of novelty, not in itself enough to sustain the patent.

Wilson Packing Co. v. Chicago Packing & Provision Co., 9 Fed. Rep. p. 547.

Cases cited by the plaintiffs in their brief go to the same effect. Therefore, further citations on this point are unnecessary.

Plaintiffs lay great stress upon the evidence that Wilcox, handling the Beck patent, and being the Pacific Coast agent for two and a half years, did sell in his territory (by this I do not know whether he includes only California, Oregon, Washington and Idaho, or the western states), *about* 500,000 copies. It may only have been 499,999. And his very statement shows that some of the merchants to whom he sold books, *did not* re-order them. We must take into consideration the nature of the article; the great length of time in which he has been establishing the vast territory handled by him, in which common knowledge tells us that millions of such pads are used yearly. It does not show such a great public need, there being hundreds of large stores, any one of which adopting the same would use thousands of them a year.

"The fact that the patented mechanism is in large demand, and has gone into extensive use, *is evidence of invention* ONLY WHEN THAT QUESTION IS IN DOUBT on the other evidence. It cannot sustain a patent for an alleged invention which is clearly without patentable novelty."

Goss Printing Press Co. v. Scott, 103 Fed. 650.

Duer v. Lock Co., 149 United States, 216.

That the device is convenient and profitable to the patentee is no evidence that it possesses the quality of invention.

159 U. S. 487.

In Smith v. Nichols, 6 Fisher, p. 61, Lowell, J., says: "The fact that an article is better, and more useful in the trade, is

evidence of novelty, but if the superiority is attained by the application of known means in a known way, and to produce a known result, though a better one, the novelty required by the patent law is wanting."

The same rule is *emphatically* stated in the case of Smith v. Goodyear Dental Vulvanite Co., 3 Otto, 486, quoted at length by plaintiffs on page 40 of their brief.

Each and all of plaintiffs' citations will be discussed on the oral argument.

IV.

Beck Patent Claim No. 1.

The point that the combination comprising elements of claim No. 1 in the Beck patent were not in controversy and should not have been included in the judgment of the court below, might have been well taken were it not for the fact that the issues raised in the pleadings must govern, and to them only does the court look. See plaintiffs' amended complaint, transcript, bottom page 14 and top page 15, wherein they state that the letters patent granted Beck gave him only the right set forth in their claim No. 3, they omitting claims 1 and 2, so that from the face of the complaint it would appear that the whole benefit and claim of the combination was as set forth in their claim No. 3.

V.

Who is Jarrett? Who is Bullivant?

Several times the plaintiffs bring in the name of Jarrett, criticising him, and characterizing Bullivant as a "dummy or

cat's-paw" for Jarrett. To say the least, they should have confined themselves to the record, but not having done so, we cannot allow it to pass unnoticed.

Formerly in order to sue in court of equity for infringement, it was necessary to first establish the patent by an action of law, but this rule has long been changed. (Robinson on Patents, section 1085, note 4, and cases cited.).

The plaintiffs are both residents of New York. Jarrett, who was charged as the infringing manufacturer, lives in Seattle, Washington. They have but one agent for the whole Pacific Coast. Why did he not sue the manufacturer? Why should they take an uninterested corner grocer into the Federal Courts for using a duplicate pad, as charged, when the very testimony of Wilcox shows that he promised to buy the next pads from the latter? A few days later he was sued, because Beck had appropriated as private property what properly belonged to the public. To use the language of Justice Bradley (107 United States, 192): "He is one of those speculative schemers who made it his business to watch the advancing wave of improvement and gather its foam in the form of a patented monopoly to enable him to lay a heavy tax upon the industry of the country without contributing anything to the real advancement of the art."

They ask why Jarrett did not first get the patent, and state it to be because the latter did not realize the susceptibility of he component parts of the manifold book in question, until he had been instructed by the Beck invention . In their very words do we say that Beck did not realize the susceptibility of the component parts of the book in question until he had been first instructed by public knowledge, as evidenced by our exhibits. They complain at the very litigation which they have started, and kept going, showing that they did not expect a

contest from Bullivant, and wanted to establish by default their alleged patent. It is more than amusing to think that after suing a man needlessly and unjusly, they should criticise his defending the case.

Should they by some unforeseen way succeed, the costs should by reason of the foregoing be paid by them.

VI.

BY A WRIT OF ERROR THIS TRIBUNAL CAN REVIEW THE RECORD AND PROCEEDING IN THE LOWER COURT ONLY FOR ERROR OF LAW NOT ERROR OF FACT. ONLY UPON AN APPEAL COULD THE APPELLATE COURT REVIEW THE CASE ON THE EVIDENCE TAKEN IN THE INFERIOR COURT.

See Section 1011 Revised Statutes of the United States.

Foster's Federal Practice, Section 394.

United States v. Goodwin, 7 Cranch. 108.

United States v. Dawson, 101 U. S. 569.

Miles v. United States, 103 U. S. 304.

Robinson on Patents, Section 1079.

7th Encyc. of Pl. & Pr., Sections 2 and 3, pages 847 and 848.

The above rule was relative to cases taken from the Circuit Court to the United States Supreme Court and is applicable to the case in question under section 11, page 905, of the supplement to the Revised Statutes of the United States.

Even were it a mixed question of law and fact, the writ would not lie.

7 Enclyc. Pl. & Pr., p. 849.

Tucker v. Spaulding, 13 Wallace, 453.

Under these authorities questions depending on the weight of evidence are to be conclusively settled in the trial or lower court, and if there is any question in the mind of this court as to the issue determined by the lower court in the case being an issue of fact not law, the following authorities relieve all doubt. The one question and the only question for the determination of the lower court, as stated by us and so frequently by the plaintiffs in their brief, was to use their wording: "Was Beck the first one to dispense with a second operation, that of handling the carbon with the fingers; did any one else select and combine the parts and produce a book like Beck's for the same purpose, operating substantially the same and accomplishing substantially the same result?"

VII.

"NOVELTY" AND "INVENTIVE SKILL" ARE QUESTIONS OF FACT.

That the question of novelty is a question of fact for the jury or trial judge is well shown in the cases of

Westlake v. Carter, et al., 6 Fisher, 519; s. c. 4 Og. 636.

Battin v. Taggert, 17 How. 74.

In re Pennock, 1 McArthur, 531; s. c., 5 Og. 668.

Section 1022 Robinson on Patents.

Adams v. Bellaire Stamping Co., 28 Fed. 360.

That the identity of prior and present inventions is a question of fact for the jury, see

Battin v. Taggert, 17 How. 74.

Tyler v. Boston, 7 Wallace, 327.

Turrill v. Railroad Co., 1 Wallace, 491.

Tathana, et al., v. Leroy, et al., 2nd Blatchf. 474; s. c. 23 Fed. Cases, 712.

Forbush, et al., v. Cook, 9 Fed. Cases, 423, cited at length by plaintiffs, page — of their brief.

That whether two patents whose specifications are not in the same terms describe the same invention is a question for the jury (we, however, claim defendant's Exhibit "A" and Beck's claim to be in practically the same language).

Bichoff v. Wethered, 9 Wallace, 812.

That whether the patented invention is identical with the one described in a printed publication is a question for the jury where they differ on their face.

Keys v. Graut, 118 U. S. 25.

Adams v. Bellaire Stamping Co., 28 Fed. 360.

The very case cited by counsel, 4 Fed. Rep. 900, entitled Washburn v. Moon Manf. Co. v. Haish, holds the question in issue here to be a question of fact, and in the case of Tucker v. Spaulding, 13 Wallace, 453, Justice Miller, delivering the opinion of the court, said as to the fitness of the jury as a tribunal to determine the diversity or identity in principle of two mechanical instruments: "It cannot be questioned that when the plaintiff in the exercise of the option which the law gives him, brings his suit in the law in preference to the equity side of the

court, that question must be submitted to the jury, if there is such resemblance as raises the question at all. And though the principles by which the question must be decided may be very largely propositions of law, it still remains the essential nature of the jury trial that while the court may on this mixed question of law and fact, law down to the jury the law which should govern them, so as to guide them to truth, and guard them against error, and may, if they disregard instructions, set aside their verdict, the ultimate response to the question must come from the jury."

1. THE LOWER COURT COMMITTED NO ERROR.

2. IF IT DID IT WAS ERROR OF FACT.

3. IF IT COMMITTED ANY ERROR OF FACT IT WAS AN IMMATERIAL ONE NOT EFFECTING THE MERITS.

4. EVEN THOUGH A MATERIAL ERROR OF FACT HAD BEEN COMMITTED, NO WRIT OF ERROR WOULD LIE.

Respectfully submitted,

OTTO J. KRAEMER,
Attorney for Defendant in Error.

1791

No. ~~911~~

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN SALES BOOK COMPANY (A CORPORATION) AND WARREN F. BECK,
Plaintiffs in Error,

vs.

JOSEPHUS BULLIVANT, JR.,
Defendant in Error.

Petition for Re-hearing.

T. J. GEISLER,
Attorney for Plaintiffs in Error, Petitioners.

UNION PRINTING CO., 84-86 FOURTH STREET, PORTLAND, OREGON

IN THE

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FOR THE NINTH CIRCUIT

AMERICAN SALES BOOK COMPANY (A CORPORATION) AND WARREN F. BECK,
Plaintiffs in Error,
vs.
JOSEPHUS BULLIVANT, JR.,
Defendant in Error.

No. 971

Petition for Re-hearing.

Your petitioners, the above named plaintiffs in error, hereby petition this Court for a re-hearing of the writ of error in the above entitled cause, for the following reasons:

It appears to your petitioners from the opinion of this Court that their argument has been misunderstood, and by reason thereof, the error of law, specified in the

12th Assignment of Error against the judgment of the Court below, has been overlooked.

The opinion of this Court states the following propositions of law:

a. That the thing patented must combine, 1 Novelty; 2. Utility; 3. Invention, and it is void if it lacks either; whether it does is a question of fact.

b. That extensive use is not conclusive on the question of patentable novelty.

c. That the plaintiffs in error have argued this case upon the theory that it is the duty of the Court to review all the *findings of fact* found by the Court below, and determine whether there is any *sufficient evidence* to support such findings. Such, however, is not the law.

d. That the only question on the writ of error before this Court is whether there is any error in the *judgment* granted by the Court upon the *facts found.*

The plaintifffs in error did not question the rules of law stated in the foregoing propositions. But proposition *C* does not state the position of your petitioners before this Court.

The real position of the plaintiffs in error was, that upon the *ultimate* facts (to be distinguished from *mere recitals of evidence*) found by the Court below, its conclusion of law and judgment cannot be supported. This was the main ground for suing out the writ of

error in this case, and is the reason given in the 12th Assignment of Error, which reads:

"12. Error of the Court in giving *judgment* in favor of the defendant in this case on the *facts found* by the Court." (Record P. 44.)

It is also of record in the Bill of Exceptions (Record P. 39) that plaintiffs in the Court belowduly excepted to the conclusion of law and judgment of the Circuit Court for the reason that the *facts found are wholly insufficient to support said judgment.*

Under said 12th Assignment of Error, your petitioners desire to submit to your honors, as a question of law, that the judgment of the Court below cannot be upheld for the following reasons:

1. That the mere fact found by the Court below in its 12th finding, that the patented invention possessed no *superior* degree of utility over other contrivances for a like purpose, is not sufficient to sustain its conclusion of law and judgment, that the patent is void for lack of novelty in the thing invented. The true rule of law is, that while the thing patented must possess novelty and utility, and must have required invention, yet the degree of either is immaterial.

2. That though the Court below may not have applied such erroneous rule of law, it, nevertheless, is evident that *its judgment is not supported by any finding of fact on the material issues in the case. There was no finding of the Circuit Court that the Beck book was devoid of patentable novelty.* Un-

doubtedly, it is sufficient to defeat the Beck patent, if the thing patented absolutely lacks either novelty, or utility, or invention; and the ultimate finding of fact on either issue by the Court below is not reviewable. But the letters patent in question were *prima facie* proof of the existence of all three requirements; and our petitioners submit *that whatever the sufficiency of defendant's evidence to prove that the Beck improvement was not a patentable novelty, the issue required a specific finding; and such finding cannot be supplied by assuming what the trial court may have intended.*

From an inspection of the Findings (Record P. 29) it appears that the infringement of Beck's patent is admitted. The question at issue was whether the patent was valid. Defendant contended that it was not, because of the prior state of the art. To substantiate this contention defendant introduced evidence of certain devices which he claimed anticipated Beck's idea. The nature of such evidence is stated in the Circuit Court's findings of fact Nos. 7 to 10 inclusive. Such findings are mere statements of the *preliminary* facts upon which the Circuit Court was then to find the *ultimate* fact—whether the Beck improvement did or did not possess patentable novelty. But it is apparent that the Circuit Court entirely omitted to find on such issue either way.

Following the findings stating the evidence on the issue involved is the 11th. This reads:

"11. That the *defendant relied* on the stipulation

as to facts herein and also as illustrated by defendant's exhibits A, B and C, and also upon the use of thumb-holes in indexes for books, *as proving that* the said invention lacks novelty, and is a mere mechanical change of said existing devices."

Manifestly, this finding cannot be construed as an ultimate finding on the issue of patentable novelty. It is a mere statement of *what the defendant relied on*, and of what the defendant *claimed* as the effect of his proof *without determining what such effect really is.*

The 12th finding on utility has already been considered;

Immediately following such 12th finding, the Circuit Court announced as its *conclusion of law* and judgment in the premises that the patent to Beck was void for lack of novelty.

That the conclusion of law is distinct from the findings of fact, and cannot be considered in aid of the latter need not be argued.

Special findings, as in the case before your honors, must be considered the same as a special verdict.

> Sec. 700 Rev. Stat. *Supervisors* vs. *Kennicott*, 103 U. S. 554,556.

In order to support a judgment, the special verdict must pass on all the material issues made by

the pleadings. The *ultimate fact* must be found. A detailed account of the *evidence* tending to prove the ultimate fact will not answer, remarked Ch. J. Marshall, "although in the opinion of the Court there was sufficient *evidence* in the special verdict from which the jury *might* have found the fact."

Barnes vs. *Williams, 11 Wheat. 415.*

When the judgment is not sustained by the special verdict it must be reversed and a new trial ordered.

Hodges vs. *Easton, 106 U. S., 408.*

In the State of Oregon, where this case was tried, it has been repeatedly held that a party is entitled as a matter of right to a finding on every material issue made by the pleadings; and the absence of such finding is a reversible error.

Moody vs. *Richards, 29, Or. 282.*

Daley vs. *Larsen, Ib. 535.*

Jameson vs. *Coldwell, 25 Or. 199.*

Fink vs. *Canyon Road Co., 5 Or. 301.*

Pengra vs. *Wheeler, 24 Or. 532.*

Courts cannot upon a special verdict infer facts not actually found.

Bank of Alexandria vs. *Swann, 2 Fed. Cas. 615.*

Nothing is to be intended in aid of a special verdict.

A special verdict must be certain, so as to stand as a final decision of the special matters with which it deals.

If it be ambiguous, or uncertain, or doubtful which way the Court intended to find, a new trial must be awarded.

Where a special verdict fails to determine all the issues, *the ignored issues must be regarded as not sustained by the party on whom rests the burden of proof.*

Vol. 28 Am. & Eng. Enc. Law, pp. 380,388, and cases there collated.

Since the judgment here in question is not sustained by the special findings, it should be reversed, and a new trial ordered.

Your petitioners, therefore, pray that the Court may reconsider its conclusions in this cause, and that the plaintiffs in error be awarded such relief as they are entitled to.

Respectfully submitted,

AMERICAN SALES BOOK COMPANY
and WARREN F. BECK,
Plaintiffs in Error.

By T. J. GEISLER,
Attorney for Petitioners.

UNITED STATES OF AMERICA,
District of Oregon, } ss.

I, T. J. Geisler, do hereby certify that I am an attorney and counselor of this Court; That I have personally prepared and examined the foregoing petition for re-hearing; and that the same is well founded in my judgment, and that it is not interposed for delay.

T. J. Geisler

Atty. and Counsel for Petitioners.